

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

James A. McGee,	:	
Appellant-Appellant,	:	
v.	:	No. 09AP-680
Director, Ohio Department of Job & Family Services et al.,	:	(C.P.C. No. 08CVF-09-13141)
Appellees-Appellees.	:	(REGULAR CALENDAR)
	:	

---

D E C I S I O N

Rendered on February 25, 2010

---

*James A. McGee*, pro se.

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

*Marchelle Moore*, for appellee Central Ohio Transit Authority.

---

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, J.

{¶1} Appellant, James A. McGee ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas affirming an order of appellee Ohio Department of Job and Family Services ("ODJFS") denying appellant's application for unemployment compensation benefits. Because the decision is not unlawful, unreasonable, or against the manifest weight of the evidence, we affirm.

{¶2} Appellant began working as a student bus operator for appellee Central Ohio Transit Authority ("COTA") on February 8, 2008. Appellant completed his training on April 11, 2008; however, he declined to sign off on COTA's "Student Driver Sign Off Sheet," which signifies that the student bus operator has completed the requisite training. Thereon, appellant indicated that he felt he needed additional training, so Ryan Daniel ("Daniel"), appellant's training manager, scheduled two additional weeks of training, which was to commence on April 14, 2008.

{¶3} Prior to beginning his employment with COTA, appellant had signed up for a class through the Central Ohio Workforce Investment Corporation ("COWIC"), Project Management Certification Training. Appellant scheduled the training offered by COWIC to begin when his training with COTA was to conclude, but due to the additional two weeks of training scheduled by COTA, a time conflict arose. Appellant failed to appear for his training scheduled for April 14, 2008, at COTA, choosing instead to attend the training session with COWIC. When appellant failed to appear on April 15, 2008, for his training at COTA, he was terminated.

{¶4} Appellant applied for and received unemployment compensation benefits. On May 22, 2008, however, the Director of the Office of Unemployment Compensation ("Director") issued a redetermination disallowing appellant's claim on the basis that appellant was discharged by COTA for just cause in connection with work. Appellant filed an appeal from the redetermination. On May 30, 2008, ODJFS transferred jurisdiction over to the Unemployment Compensation Review Commission ("UCRC").

{¶5} A UCRC hearing officer conducted an evidentiary hearing, at which appellant, along with several COTA employees, testified. On July 24, 2008, the hearing officer issued a decision, which set forth the following factual findings:

The claimant was employed by Central Ohio Transit Authority (COTA), from February 8, 2008, until April 15, 2008. The claimant was a student bus operator.

The claimant completed his training on April 11, 2008. He had completed that training with very high marks and scores.

When the claimant was requested to sign a document relating to his training, he refused to do so stating that he felt he needed more training. After discussion amongst varying management members of COTA, the claimant was told that he would be offered an additional two weeks of training beginning April 14, 2008.

The claimant did not want to begin that additional two weeks of training on April 14, 2008, because he had signed up for a class through Central Ohio Workforce Investment Corp., COWIC, Project Management Certification Training. The claimant wanted to delay the additional training until after he had completed the COWIC course. This was denied. The claimant was told by varying people, Ms. Moore, Mr. Daniel, Ms. McLinn and Mr. Davis, to report for the additional training on April 14, 2008. The claimant was also told that he had to choose between his position with COTA and taking the training. The claimant told Mr. Davis that he had to do what he had to do. Ms. McLinn told the claimant that if he did not show on Monday, April 14, 2008, they would know his decision.

The claimant did not report to the additional training on April 14, 2008, or on April 15, 2008. When he did not report on April 15, 2008, he was sent a letter discharging him from employment for excessive absenteeism.

COTA has a policy that any bus driver trainee that misses two or more days is subject to termination of employment for absenteeism.

Based on those factual findings, the hearing officer affirmed the Director's redetermination issued on May 22, 2008, which found that appellant was discharged for just cause. The hearing officer reasoned as follows:

The greater weight of the evidence before this Hearing Officer establishes that the claimant requested an additional two weeks of training and then refused to attend the training as instructed. The claimant's failure to report for the training constitutes fault and misconduct on the part of the claimant. The claimant's absences on April 14, and 15, 2008, were not legitimate and constitute fault and misconduct in connection with work. The claimant was discharged for just cause in connection with work. This is a disqualifying separation from employment. The claimant's application for unemployment compensation benefits is disallowed. No benefits will be paid until the claimant works in six weeks covered employment, earns \$1,236.00, and is otherwise eligible.

{¶6} Appellant filed a request for review with the UCRC, which was denied.

Appellant appealed the UCRC's decision to the common pleas court, which affirmed the UCRC's determination. Appellant appeals the common pleas court's order, assigning the following error:

#### Error I

The Court of Common Pleas (hereinafter referred to as the Court) was in error in proceeding with the Non-Oral hearing on December 15, 2008 without having Appellant's Reply Brief (not filed) to the Appellee Brief (filed on December 17, 2008) two days after the scheduled date of the Non-Oral hearing. The Appellant had no opportunity to craft a reply Brief without prior knowledge of the Court's willingness to in fact consider both the Appellee's Brief and Central Ohio Transit Authority (hereinafter referred to as COTA) Brief (filed December 23, 2008), six days after the published date of the Non-Oral hearing. This is an issue of due process.

#### Error II

The Court was in error in its statement, "Appellant claimed that his Employer know [sic] of the conflict and did nothing to

warn him of the consequences should he fail to come to work. James McGee v. Ohio State Dept. of Job and Family Services. However, the record reflected that Appellant knew of the rules concerning absences[.]" The record actually contradicts this assessment by the Court.

### Error III

The Court did not address the fact that the Hearing officer did not enforce the subpoena upon Mr. Theotis James, (Union President, Transport Worker's Union, Local 208) witness for the Appellant, on both occasions of the hearings despite the officer's own stated commitment to the contrary in hearing #1 and testimony of the Appellant asking for this witness. The Court failed to point out that the Hearing officer decided upon the relevancy of this witness testimony in light of the blatant disregard for both subpoenas and despite the Appellant's requests and other testimony.

### Error IV

The Court failed to affirm that the Appellant had indeed reached the status of Operations employee but more importantly that of Union member. The record clearly shows that the Appellant had received and signed for both the Administrative employee handbook and following that after 30 days of employment, received and signed for the Policy manual for represented employees. The Court did not address the record demonstrating that the Appellant did upon exemplary completion of all the tasks and testing assigned by COTA, reach the status of Operation's employee; his refusal to sign the Student Driver Sign off Sheet (hereinafter referred to as SDSS) attesting to the quality of training notwithstanding. The Court in its ruling James McGee v. Ohio State Dept. of Job and Family Services overlooked testimony by a COTA official that the Appellant was invited to talk to a Union representative or resign.

{¶7} Pursuant to R.C. 4141.29(D)(2)(a), an employee is ineligible to receive unemployment compensation benefits if he or she was discharged for "just cause." The Supreme Court of Ohio has defined just cause as " 'that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act.' " *Tzangas, Plakas &*

*Mannos v. Ohio Bur. of Emp. Servs.*, 73 Ohio St.3d 694, 697, 1995-Ohio-206, quoting *Irvine v. Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 17. A just-cause determination must be consistent with the purpose of the Unemployment Compensation Act, which is to provide financial assistance to individuals who become and remain involuntarily employed due to adverse business and industrial conditions. *Id.* at 697. The act protects those employees who have no control over the situation that leads to their separation from employment. *Id.*

{¶8} Consistent with the purpose of the act, the *Tzangas* court held that a discharge may be considered to be for just cause where the employee's conduct demonstrates some degree of fault. *Id.* at 698. Indeed, the court stated that "[f]ault on behalf of the employee is an essential component of a just cause termination." *Id.* at paragraph two of the syllabus. However, "a 'willful or heedless disregard of duty or violation of instructions' " is not required to satisfy the fault requirement. *Id.* at 698.

{¶9} When seeking unemployment benefits, an applicant submits information to the ODJFS in support of his or her claim. Findings of fact and conclusions of law as to whether a discharged employee is entitled to unemployment compensation are initially made by the designee of the Director of the ODJFS, R.C. 4141.28(B), subject to an appeal to the UCRC for a hearing *de novo*. R.C. 4141.281(C)(1) & (3).

{¶10} 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 UCRC. 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* at 696. Factual findings supported by some competent, credible evidence going to the essential elements of the controversy must be affirmed. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶11} Upon appeal of the UCRC's decision, the reviewing court, whether a common pleas court or court of appeals, must affirm the UCRC's decision unless it is unlawful, unreasonable, or against the manifest weight of the evidence. See R.C. 4141.282(H); *Tzangas* at 696. Under this standard of review, a reviewing court must affirm the commission's finding if some competent, credible evidence in the record supports it. *Irvine* at 18. A reviewing court is not permitted to make factual findings or determine witness credibility. *Id.* The fact that reasonable minds might come to different conclusions is not a basis for reversing the commission's decision. *Id.* "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.

{¶12} This court's focus is on the decision of the UCRC rather than the decision of the common pleas court. *Brooks v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-414, 2009-Ohio-817, ¶10, citing *Roberts v. Hayes*, 9th Dist. No. 21550, 2003-Ohio-5903, ¶11. Accordingly, our task is to review the UCRC'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.

{¶13} In his first assignment of error, appellant contends that the trial court abused its discretion when it failed to give him the opportunity to file a reply brief. Upon

review of the record, we find no evidence that the trial court precluded appellant from filing a reply brief, but even if the trial court had done so, appellant fails to explain how the filing of a reply brief would have affected the matter's ultimate outcome. Accordingly, appellant's first assignment of error is overruled.

{¶14} In his second assignment of error, appellant asserts that one of the trial court's findings of fact demonstrates an abuse of discretion, which purportedly evidences a bias against appellant. The finding of fact appellant takes issue with is as follows: "Appellant claimed that his Employer know [sic] of the conflict and did nothing to warn him of the consequences should he fail to come to work." (Appellant's brief at 8, quoting trial court's decision at 2.) Appellant cites to the testimony given by Dianne McLinn ("McLinn"), Vice President of Human Resources and Labor Relations for COTA, as evidence in the record that "contradicts" the trial court's assessment. *Id.* A review of McLinn's testimony, however, belies appellant's assertion and, in fact, supports the findings made by the UCRC hearing officer, as well as the trial court. Accordingly, appellant's second assignment of error is overruled.

{¶15} Because appellant's third and fourth assignments of error are interrelated, we shall address them together. In his third assignment of error, appellant argues that the trial court erred when it failed to "address and remedy the fact that the hearing officer did not enforce the subpoena issued to Mr. Theotis James ["James"], Union President, Transportation Workers Union, Local 208 a witness for the Appellant." (Appellant's brief at 8.) In his fourth assignment of error, appellant contends that he reached the status of an operations employee, and, therefore, he was a union member. The significance of

which, according to appellant, is that he was entitled to union representation, as well as the other benefits that are afforded to union members.

{¶16} A review of appellant's brief filed before the trial court discloses that appellant did not raise the issue of the subpoena issued to James, and, therefore, appellant has waived the issue on appeal. Additionally, appellant fails to explain what would have been the nature of James's testimony and/or how his testimony would have made a difference to appellant's case.

{¶17} Even if appellant had not waived the issue, he would still not prevail. Lana Moore ("Moore"), Director of Human Resource Services for COTA, testified that appellant was a student bus operator and, as such, was not a member of the union or bargaining unit. (Tr. 8.) Moore explained that student bus operators become union members when they "leave training and officially go on the board. Going on the board means that they are officially a Bus Operator and report to the Operations Division." (Tr. 8.) In addition, Daniel testified that a student bus operator goes on the board when they sign off on the "Student Driver Sign Off Sheet." (Tr. 17.) Here, however, appellant did not sign off on the foregoing, but, instead, he indicated a need for additional training. Thus, contrary to appellant's assertions, appellant was a student bus operator at the time he was terminated, was not on the board, and, therefore, was not a union member. Accordingly, appellant's third and fourth assignments of error are overruled.

{¶18} Based upon our review, we find that appellant's failure to report for training on April 14-15, 2008 violated COTA's absenteeism policy, and, as such, constitutes fault and misconduct in connection with work pursuant to R.C. 4141.29(D)(2)(a). Having

overruled all four of appellant's assignments of error, this court hereby affirms the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed.*

KLATT and CONNOR, JJ., concur.

---