

[Cite as *Taxel Creative, Inc. v. Kelly*, 2010-Ohio-263.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93378

TAXEL CREATIVE, INC.

APPELLANT

vs.

**HELEN E. JONES KELLY, DIRECTOR
OHIO JOB AND FAMILY SERVICES, ET AL.**

APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-678079

BEFORE: Sweeney, J., Rocco, P.J., and Boyle, J.
RELEASED: January 28, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

JAMES J. SWEENEY, J.:

{¶ 1} Appellant, Taxel Creative, Inc. (“Taxel”), appeals from the trial court’s decision that denied its appeal of the administrative determination that it discharged Nathan Telea (“Telea”) without just cause thereby allowing Telea’s application for unemployment benefits for a period to be determined by the Ohio Department of Job and Family Services. For the reasons that follow we affirm.

{¶ 2} On October 3, 2008, the Unemployment Compensation Review Commission conducted a hearing on Telea’s appeal from a redetermination that disallowed his application for unemployment compensation on the grounds that he was discharged with just cause.

{¶ 3} The President of Taxel, Mr. Taxel, testified first. Telea worked at Taxel from May 2007 until April 9, 2008. Telea submitted his resignation notice on April 7, 2008, which indicated his last date of employment would be May 30, 2008. However, Mr. Taxel terminated Telea for “surfing the Internet” in violation of company policy. Mr. Taxel discovered this after checking Telea’s internet history from April 3-8, 2008, which showed “several hundred websites” visited. Mr. Taxel testified this occurred “during company time.” Mr. Taxel cited Telea’s deteriorating performance as the basis for the internet history investigation. He wanted to see what Telea was doing with his time.

{¶ 4} The nature of Taxel’s business is commercial photography. Telea’s job duties included assisting Mr. Taxel, including setting and cleaning up photo shoots as well as working with digital files on the computer for presentation to

clients. On April 9, 2008, Telea arrived late and Mr. Taxel informed him he was terminated for his internet usage. According to Mr. Taxel, the internet history report documented the websites in the order they are visited per day but did not include the time. The hearing officer inquired: "Do you have any idea how much time he was actually spending, then, if there's no time on here?" To which Mr. Taxel responded, "Well, I can only guess."

{¶ 5} According to Mr. Taxel, Telea was frequently late to work and had not been applying himself to the job for approximately four to five months before he was terminated. Mr. Taxel said he advised Telea of these problems.

{¶ 6} Mr. Taxel said Telea's resignation "was an indication to [him] that maybe something else was going on * * * that's why [he] looked on the Internet because * * * [Telea] had lost focus and interest in his job, and it was affecting his job."

{¶ 7} Telea also testified at the hearing. He indicated that his employment involved the artistic interpretation of images, which was a subjective process that normally required multiple revisions until the product was to Mr. Taxel's liking. Telea said he noticed Mr. Taxel became more upset about his work within the month prior to his resignation. He believed Mr. Taxel was agitated by the lack of work coming into the studio. He did not notice any difference in Mr. Taxel's opinion of his work subsequent to submitting his resignation, stating "I think [Mr. Taxel] was not any different than any other day of my employment."

{¶ 8} Telea admitted that he did go to the websites reflected in the report but explained that they were not individual websites. He said, “this could have all happened at lunch time. * * * I’m not real positive about that * * *.” According to Telea, he was simultaneously running three computers: for copyrighting, proofing, and re-touching. He said during these processes he would “take short breaks” to “go on the Internet but briefly.” He did not deny being on the computer during business hours, but denied spending a lot of time on the internet during company time. He was there before and after work and during lunch at times.

{¶ 9} Telea denied being late on the day of his termination. Telea indicated that Mr. Taxel had him sign a list itemizing dates he was late. Mr. Taxel had not spoken with Telea on those specific dates about the alleged tardiness, in fact, Telea testified “we don’t have a time clock. So, there’s no real proof that I was late.” While Telea disputed the accusations, Telea believed Mr. Taxel was just bringing it to his attention and did not believe he was in danger of termination at all.

{¶ 10} Telea was informed he was being terminated for unacceptable internet use. Telea insisted he was not aware of a possibility of his termination. He indicated they ate lunch together every day and felt they had a very close relationship. According to Telea, Mr. Taxel told him he could not afford to pay him and train another employee at the same time. Telea, therefore, believed that it was his resignation that prompted the termination.

{¶ 11} Telea admitted that he resigned effective May 30, 2008 in order to go back to photography school, where he had already been accepted.

{¶ 12} Mr. Taxel submitted rebuttal testimony that Telea's post-resignation notice job performance was "terrible" and beyond nuances in color or density that could be corrected.

{¶ 13} The company internet policy provided:

{¶ 14} "Computers with Internet access are provided for company use. It is recognized that occasionally, as with the telephone, it will be necessary to access e-mail on the Internet for personal reasons. However, use of such should be limited to when absolutely necessary and, whenever possible, before 8:30 a.m., during the lunch hour, and after 5:30 p.m."

{¶ 15} On October 8, 2008, the hearing officer issued his decision finding that Telea was discharged without just cause and therefore allowing his application for unemployment compensation. The hearing officer found that "while claimant does admit that he would occasionally use the Internet for personal business during working hours, the employer's evidence does not establish that such use was excessive. The employer's personal e-mail and Internet use policy specifically recognizes that employees will occasionally use the Internet for personal reasons." The hearing officer further found a lack of support to the allegations that Telea was disciplined for his work performance. The hearing officer further found significant the fact that Telea was discharged only two days after submitting his letter of resignation.

{¶ 16} Taxel's request for further review was denied as was his appeal to the Cuyahoga County Court of Common Pleas. In this appeal, Taxel submits three assignments of error for our review, which we will address together for ease of discussion.

{¶ 17} "I. The trial court erred and abused its discretion by affirming a decision of the Review Commission, allowing the employee's unemployment compensation claim, that was unlawful, unreasonable, and against the manifest weight of the evidence.

{¶ 18} "II. The trial court erred and abused its discretion by affirming a decision of the Review Commission [that] awarded [29] weeks of unemployment compensation where the employee had announced his intention to quit his employment after eight weeks in order to enroll in school in another state.

{¶ 19} "III. The trial court erred and abused its discretion by giving uncritical acquiescence to the administrative findings of the Review Commission and by imposing an unlawful burden of proof upon the employer."

{¶ 20} A reviewing court "may reverse a decision of the Unemployment Compensation Review Commission only if the decision is unlawful, unreasonable, or against the manifest weight of the evidence." *Lorain Cty. Aud. v. Ohio Unemp. Comp. Rev. Comm.*, 113 Ohio St.3d 124, 2007-Ohio-1247, ¶9, citing R.C. 4141.282(H); *Tzangas, Plakas & Mannos v. Ohio Bur. of Emp. Servs.* (1995), 73 Ohio St.3d 694, 653 N.E.2d 1207, paragraph one of the syllabus.

{¶ 21} Appellate courts have the duty to determine whether the board's decision is supported by the evidence in the record. *Irvine v. Unemp. Comp. Bd. of Review* (1985), 19 Ohio St.3d 15, 18, 482 N.E.2d 587.

{¶ 22} Under R.C. 4141.29(D)(2)(a), an employee who is fired from work for just cause is ineligible to receive unemployment benefits. *Ford Motor Co. v. Ohio Bur. of Emp. Servs.* (1991), 59 Ohio St.3d 188, 189, 571 N.E.2d 727. “Traditionally, just cause, in the statutory sense, is that which, to an ordinary intelligent person, is a justifiable reason for doing or not doing a particular act.’ * * *

* Just cause determinations in the unemployment compensation context, however, also must be consistent with the legislative purpose underlying the Unemployment Compensation Act * * * ‘to enable unfortunate employees who become and remain involuntarily unemployed by adverse business and industrial conditions, to subsist on a reasonably decent level and is in keeping with the humanitarian and enlightened concepts of this modern day.’” *Tzangas*, 73 Ohio St.3d at 697, 653 N.E.2d 1207.

{¶ 23} We are to determine the existence of just cause on a case-by-case basis since “just cause necessarily depends upon the unique factual considerations of the particular case.” *Id.* at 698, 653 N.E.2d 1207, quoting *Irvine*, *supra* at 17.

{¶ 24} Although Telea submitted a resignation letter on April 7, 2008, the effective end date of his employment was May 30, 2008. Taxel instead terminated him two days later on April 9, 2008.

{¶ 25} “The determination of whether an early termination after notice of quitting is proper, i.e. with cause, will be based upon the facts and circumstances of each case. The reviewing court will be limited to determining whether the board of review’s decision is unlawful, unreasonable or against the manifest weight of the evidence.” *Claim of Sharon Smith v. Yund, Inc.* (July 3, 1985), Wayne App. No. C.A. NO. 2069; see, also, R.C. 4141.28(H).

{¶ 26} In *Yund*, the court observed, “if the employer can show some legitimate business reason for early termination, then the discharge will be with just cause for the purposes of determining eligibility for unemployment compensation. For example, we can foresee [sic] the need to hire and teach a replacement early to insure having a trained employee during a busy time period, as being a legitimate reason for immediate discharge. Likewise, security reasons, such as replacing an employee leaving for a competitor before a new product is to be introduced, may also qualify. This type of reason, however, must motivate the employer’s actions. The early discharge cannot stem merely from the employee’s intention to quit.”

{¶ 27} In this case, Taxel maintained that Telea was terminated prior to the expiration of his notice period because he violated the company’s internet use policy. Because there is some competent, credible evidence in the record to support the administrative decision that Telea was discharged without just cause, we must affirm.

{¶ 28} The company policy provides for use of the internet for personal reasons but indicates such usage should be limited to “when absolutely necessary” and “whenever possible before 8:30 a.m., during the lunch hour, and after 5:30 p.m.” Here, Telea admitted he did use the internet for personal use but only “briefly” during company time, otherwise he stated his use was limited to lunch hours and before and after working hours. The internet history report does not contradict Telea’s testimony. It does not indicate at what times or for what duration Telea was using the internet for personal use on the dates in question. Finally, Mr. Taxel said he could only guess how much company time Telea was spending on the internet for personal reasons. Telea presented some competent, credible evidence of his entitlement to some unemployment benefits.

While Taxel presented some contradictory testimony, there is no evidence that definitively establishes a violation of the company’s internet policy, which by its terms allows for times that an employee could use the internet during business hours for personal use. It was reasonable to find that Telea had satisfied his burden. For these reasons, the administrative decision was not unlawful, unreasonable, or against the manifest weight of the evidence nor did it place a burden of proof upon the employer.

{¶ 29} Assignments of Error I and III are overruled.

{¶ 30} Taxel further maintains that Telea is not entitled to unemployment compensation for any period after May 30, 2008. While there is no dispute that Telea resigned without just cause effective May 30, 2008, Telea’s monetary

entitlement has yet to be determined. The matter was remanded to the ODJFS with instructions to “determine claimant’s monetary entitlement and any charges to the base period employers.”

{¶ 31} Accordingly, Assignment of Error II is overruled as premature.

Judgment affirmed.

It is ordered that appellee recover from appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

KENNETH A. ROCCO, P.J., and
MARY J. BOYLE, J., CONCUR