

THE STATE OF OHIO)
)
CUYAHOGA COUNTY)

S.S.

IN THE COURT OF COMMON PLEAS
CASE NO. 416735

LARRY KOVAL,)
)
Appellant,)
)
vs.)
)
ADMINISTRATOR, OHIO)
BUREAU OF EMPLOYMENT)
SERVICES¹, et al.,)
)
Appellees.)

JUDGMENT AND OPINION

Shirley Strickland Saffold, J.:

JUDGMENT

Appellant, Larry Koval, filed a Notice of Appeal on August 31, 2000, seeking a reversal of the decision of the Unemployment Compensation Review Commission which disallowed his Application for Determination of Benefit Rights as improperly filed. Upon review of the transcript and the briefs filed in this matter, the Court finds that the decision of the Unemployment Compensation Review Commission was not unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, the decision of the Unemployment Compensation Review Commission is affirmed.

¹ It should be noted that on July 1, 2000, the Ohio Bureau of Employment Services ("OBES") was merged into the Ohio Department of Job and Family Services ("ODJFS") pursuant to H.B. Nos. 470 and 471. As a result, the functions of the Administrator under the OBES are now fulfilled by the Director for the ODJFS.

OPINION

Larry Koval ("Claimant", "Appellant") worked for Dow Jones & Company ("Employer") from January 12, 1978, until February 5, 1999. Claimant was released as a result of the consolidation of Employer's circulation territories. Although February 5, 1999, was Claimant's last day of work, he remained on the Employer's payroll until March 5, 1999. Following March 5, 1999, Employer gave Claimant forty-nine (49) weeks of severance pay.

Claimant filed an Application for Determination of Benefit Rights on February 5, 1999. Initially, the claim was allowed with a benefit year which was set to begin on January 31, 1999.² However, once it was discovered that Employer provided Claimant with forty-nine (49) weeks of severance pay, the claim was disallowed.

Claimant tried to re-file for unemployment benefits on January 3, 2000, but was told he needed to re-file at the end of January.³ On January 31, 2000, Claimant filed his second Application for Determination of Benefit Rights. The Administrator disallowed the Application for Determination of Benefit Rights on February 1, 2000, as it had not been properly filed. The Administrator made a redetermination on February 29, 2000, which affirmed the disallowance. Claimant filed a timely appeal to the Administrator on March 21, 2000. The Administrator transferred this matter to the Unemployment Compensation Review Commission on April 3, 2000. On April 21, 2000, a hearing was held and evidence was taken by the Hearing Officer on

² The benefit year began on January 31, 1999, because that was the beginning of the week for the filing date of February 5, 1999. The benefit year ended fifty-two (52) weeks later on January 29, 2000. OHIO REV. CODE ANN. § 4141.01 (R) (Baldwin 2000).

³ It is unclear whether this was because the first benefit year ended on January 29, 2000, or the reasoning involved his severance payments. Either way, this issue is not contested.

behalf of the Unemployment Compensation Review Commission. The Unemployment Compensation Review Commission affirmed the Administrator's redetermination made on February 29, 2000. Claimant filed a Request for Review with the Unemployment Compensation Review Commission on May 19, 2000. The Request for Review was denied on August 1, 2000, and Claimant filed the instant appeal on August 31, 2000. The Notice of Appeal sought a reversal of the decision of the Unemployment Compensation Review Commission which disallowed his Application for Determination of Benefit Rights as improperly filed. The Court now hears this appeal.

Claimant argues that the Hearing Officer on behalf of the Unemployment Compensation Review Commission improperly used 26 USCS § 3304 (a) (7) of the Federal Unemployment Tax Act ("FUTA") to define Ohio Revised Code § 4141.01 (R). Section 3304 (a) (7) of FUTA reads:

an individual who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year;

Since Claimant did not receive money during his first benefit year, he argues the entire provision, including the six (6) week employment requirement, does not apply. As a result, Claimant contends the Unemployment Compensation Review Commission's decision was unlawful, unreasonable, and against the manifest weight of the evidence.

Claimant asserts that even if the six (6) week employment requirement found in Ohio Revised Code § 4141.01 (R) applied, he fulfilled the requirement. First, Claimant points to the February 3, 1999, letter from Employer informing Claimant that his employment would end on March 5, 1999. Even though he was not required to report to work after February 5, 1999, he remained on the payroll until March 5, 1999. Claimant claims that he was "on call" during this

period and the pay he received was in exchange for being "on call." Second, Claimant states the forty-nine (49) weeks of severance pay constituted remuneration. Therefore, according to Ohio Administrative Code 4141-9-07 and 4141-9-08, the period in which Claimant received these payments should be considered employment, especially in light of the fact that these severance payments prevented him from receiving unemployment benefits when he filed on February 5, 1999. As further proof, Claimant asserts that this severance pay was taxed as wages.

Appellees emphasize that Claimant's first benefit year ran from January 31, 1999, through January 29, 2000. Claimant filed a second unemployment application in January 2000. As a result of applications being filed in February 1999 and January 2000, Claimant created two (2) successive benefit years. This caused the six (6) week employment requirement under Ohio Revised Code § 4141.01 (R) to be applicable.

Appellees concede that Claimant had remuneration from his severance pay because according to Ohio Administrative Code 4141-9-04 (B) severance pay is remuneration, but argue he needs both remuneration and employment to qualify for unemployment benefits in a second benefit year. Employment is defined in Ohio Revised Code § 4141.01 (B) (1) to mean "service performed by an individual for remuneration under any contract of hire, written or oral, express or implied," OHIO REV. CODE ANN. § 4141.01 (B) (1) (Baldwin 2000). No evidence was presented to show Claimant had employment during his first benefit year. In fact, the evidence points to the contrary. On Claimant's second application, he wrote that his last day of work was February 5, 1999, and he did not expect to return to work for his Employer. Appellees also argue that the record does not reflect any evidence that Employer kept Claimant on the payroll to answer questions or perform work. Claimant also testified at the hearing that he did not have a

contract for hire.

Appellees assert that the Unemployment Compensation Review Commission based its denial on Ohio Revised Code § 4141.01 (R), not 26 USCS § 3304 or the Unemployment Insurance Program Letter No. 18-92. Appellees explain that federal funding of FUTA requires that states adopt the minimum requirements found in 26 USCS § 3304. The Hearing Officer on behalf of the Unemployment Compensation Review Commission was using this Section to explain the reasoning behind the requirement to work between benefit years. In addition, state law controls for the determination of unemployment benefits, not a federal law that sets minimum standards. As for Unemployment Insurance Program Letter No. 18-92 which defines work for 26 USCS § 3304, the requirement of service under a contract for hire that provides remuneration is a result of Ohio's compliance with this letter. Ohio has used its power to broaden its definition of work through Ohio Revised Code § 4141.01 (R) and 4141.01 (B).

This Court begins looking at this case by setting forth the standard of review. Ohio Revised Code § 4141.28 (O) (1)⁴ provides:

If the court finds that the decision was unlawful, unreasonable, or against the manifest weight of the evidence, it shall reverse and vacate such decision or it may modify such decision and enter final judgment in accordance with such modification; otherwise such court shall affirm such decision.

OHIO REV. CODE ANN. § 4141.28 (O) (1) (Baldwin 2000). When there is an appeal from the final decision of the Ohio Bureau of Employment Services, “[t]he Court of Common Pleas is not authorized to *try* the issues of fact in this kind of proceeding. [I]t is limited to finding ‘that the decision [of the board of review] was unlawful, unreasonable, or against the manifest weight of

⁴ This Section is now renumbered Ohio Revised Code § 4141.28 (N).

the evidence'" *Hall, et al. v. American Brake Shoe Co., et al.*, 13 Ohio St.2d 11, 233 N.E.2d 582 (1968). "The resolution of purely factual questions is for the Board of Review as the trier of fact." *Franklin v. Rose Park Convalescent & Rehabilitation Center, et al.*, No. 56398, 1989 Ohio App. LEXIS 5169 (8th App. Dist. 1989) (citing *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511 (1948)). "The only duty or authority of the Common Pleas Court was to determine whether the decision of the Board of Review was supported by the evidence in the record. The claimant was not entitled to a trial *de novo*." *Kilgore v. Board of Review, Bureau of Unemployment Compensation, et al.*, 2 Ohio App. 2d 69, 206 N.E.2d 423 (4th App. Dist. 1965) (citing *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511 (1948)). "A decision of the Board supported by some competent, credible evidence will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Franklin v. Rose Park Convalescent & Rehabilitation Center, et al.*, No. 56398, 1989 Ohio App. LEXIS 5169 (8th App. Dist. 1989) (citing *Angelkovski v. Buckeye Potato Chips Co.*, 11 Ohio App. 3d 159 (1983)). "A reviewing court can not [sic] usurp the function of the triers of fact by substituting its judgment for theirs." *Simon v. Lake Geauga Printing Co., et al.*, 69 Ohio St. 2d 41, 430 N.E.2d 468 (1982) (citing *Brown-Brockmeyer Co. v. Roach*, 148 Ohio St. 511 (1947)).

The Court finds that the Unemployment Compensation Review Commission based its decision on Ohio Revised Code § 4141.01. The Court and the Unemployment Compensation Review Commission acknowledge that 26 USCS § 3304 (a) (7) sets forth the minimum requirements states must adopt in order to receive federal financing of FUTA. Nonetheless, Ohio Revised Code § 4141 is controlling. Ohio Revised Code § 4141.01 (R) defines benefit year as follows:

'Benefit year' with respect to an individual means the fifty-two week period beginning with the first day of that week with respect to which the individual first files a valid application for determination of benefit rights, and thereafter the fifty-two week period beginning with the first day of that week with respect to which the individual next files a valid application for determination of benefit rights after the termination of the individual's last preceding benefit year, except that the application shall not be considered valid unless the individual has had employment in six weeks that is subject to this chapter or the unemployment act of another state, or the United States, and has, since the beginning of the individual's previous benefit year, in the employment earned three times the average weekly wage determined for the previous benefit year. . . .

OHIO REV. CODE ANN. § 4141.01 (R) (Baldwin 2000). Claimant's first benefit year ran from January 31, 1999, through January 29, 2000. In order for Claimant to qualify for a second benefit year, he was required to have six (6) weeks of employment after his first benefit year began.

Ohio Revised Code § 4141.01 (B) (1) defines employment as "service performed by an individual for remuneration under any contract of hire, written or oral, express or implied"

OHIO REV. CODE ANN. § 4141.01 (B) (1) (Baldwin 2000). Remuneration is defined under Ohio Revised Code § 4141.01 (H) (1) as "all compensation for personal services"

OHIO REV. CODE ANN. § 4141.01 (H) (1) (Baldwin 2000). The statute requires both service and remuneration for employment. The question now becomes whether he met the two (2) prong definition of employment for the required six (6) weeks. Claimant filled out his second Application for Determination of Benefit Rights by writing that the last day worked was February 5, 1999, and he did not expect to return to work for Employer. As a result, Claimant was employed from January 31, 1999, through February 5, 1999 (one (1) week), during his first benefit year.⁵ Claimant argues that he was "on call" and still on the payroll until March 5, 1999, so these additional weeks should be counted as employment. The record fails to support

⁵ Claimant's first benefit year ran from January 31, 1999, to January 29, 2000.

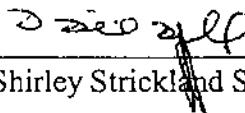
Claimant's assertion that he was "on call" from February 5, 1999, through March 5, 1999. The February 3, 1999, letter from Employer did not mention that Claimant was kept on the payroll in exchange for being "on call." It only said that employment ended on March 5, 1999. In fact, the Unemployment Compensation Review Commission found in its Findings of Facts that Claimant was left on the payroll to give Claimant an opportunity to liquidate his stock holdings which needed to be done while still an employee. In addition, the Unemployment Compensation Review Commission's Findings of Facts stated that Claimant did not perform any service after February 5, 1999. Claimant even admitted at the hearing before the Hearing Officer on behalf of the Unemployment Compensation Review Commission that he did not have a written contract to hire. As a result, the Court finds no evidence to suggest that this should be considered employment. Even though Claimant may have received remuneration from remaining on the payroll, he did not fulfill the service element. The Court will not question the Findings of the Hearing Officer on behalf of the Unemployment Compensation Review Commission because the Court finds there is sufficient evidence to support a holding that the last day of employment was February 5, 1999. As a final note, if Claimant considered himself employed until March 5, 1999, why did he file an unemployment application on February 5, 1999.

The next question is whether Claimant's forty-nine (49) weeks of severance pay can be considered employment. Once again Ohio Revised Code § 4141.01 (B) (1) requires both service and remuneration to meet the definition of employment. According to Ohio Administrative Code 4141-9-04 (B), severance pay is considered to be remuneration. However, the record is void of any evidence to suggest that Claimant met the service element even if this Court uses both 1999 and 2000. As a result, the six (6) week employment requirement was not met.

The Court finds that the Hearing Officer on behalf of the Unemployment Compensation Review Commission dealt with 26 USCS § 3304 (a) (7), *Radcliffe v. Artromick International, Inc.*, 31 Ohio St.3d 40 (1987), *Richardson v. Perkins Township*, Erie App. No. E-97-140 (1998), and the Unemployment Insurance Program Letter No. 18-92. This Court does not find the reasoning unreasonable, unlawful, or against the manifest weight of the evidence.

The Hearing Officer on behalf of the Unemployment Compensation Review Commission decided that being on a payroll without being required to perform service and receiving severance pay does not meet the requirements of Ohio Revised Code § 4141.01 (R). Based upon the evidence from the record, this Court concludes that the Unemployment Compensation Review Commission's decision was not unlawful, unreasonable, or against the manifest weight of the evidence. Accordingly, the decision is affirmed in all respects.

IT IS SO ORDERED.



Judge Shirley Strickland Saffold

Date: 5/1/01

NOTICE OF SERVICE

A copy of the foregoing JUDGMENT AND OPINION was forwarded this 1st day of
March 2001, by regular United States Mail to:

Edward G. Kramer
David G. Oakley
Kramer & Associates, L.P.A.
3214 Prospect Avenue, East
Cleveland, Ohio 44115-2600

and

Charlett Bundy
Assistant Attorney General
Employment Services Section
State Office Building, 11th Floor
615 West Superior Avenue
Cleveland, Ohio 44113-1899.

Shirley Strickland Saffold

JUDGE SHIRLEY STRICKLAND SAFFOLD

koval.admapp