SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

October 27, 2011

Larry Brittingham
22304 Raven Circle
Lincoln, Delaware 19960

Re: ***Brittingham v. McDonald's*;**
C.A. No. S10A-08-007

On Appeal from the Unemployment Insurance Appeal Board: AFFIRMED

Date Submitted: October 14, 2011
Date Decided: October 27, 2011

Dear Mr. Brittingham:

Larry Brittingham appeals the decision of the Unemployment Insurance Appeal Board ("the Board") that denied Mr. Brittingham's appeal from an Appeals Referee's determination that Mr. Brittingham had been discharged from his place of employment for just cause in connection with that employment. The Board's decision is affirmed for the reasons stated below.

Nature and Stage of the Proceedings

Mr. Brittingham had worked for Twenty-Nine Corporation ("Twenty-Nine") as a maintenance person for approximately fifteen years in January 2010. During that month, Twenty-Nine's director of operations, James Schaffer, testified there had been a

large volume of theft from the McDonald's store run by Twenty-Nine and where Mr. Brittingham worked. Mr. Schaffer and the store manager, Jennifer Holston, reviewed surveillance tapes from inside the restaurant. On a tape recorded on January 27, 2010, Mr. Brittingham was observed taking some packets of oatmeal and raisins and putting them in his pocket. Mr. Brittingham was terminated as a result of this action. The Claims Deputy found Mr. Brittingham had been terminated for just cause in connection with his employment. A hearing was held before an Appeals Referee on April 15, 2010. Before the Appeals Referee, Mr. Schaffer testified Twenty-Nine's policy is that an employee is automatically terminated if he is caught taking product without approval. Mr. Schaffer notified Mr. Brittingham via telephone that he was terminated for theft. Mr. Brittingham did not dispute that he took the oatmeal and the raisins but objected on the grounds that Mr. Schaffer did not speak with Mr. Brittingham face-to-face about the incident. The Appeals Referee concluded Mr. Brittingham had been terminated for just cause in connection with his employment by way of written decision mailed April 16, 2010. Mr. Brittingham appealed that decision and a hearing was held before the Board on June 29, 2010. At the Board hearing, Mr. Brittingham reiterated his objection that Mr. Schaffer did not ask Mr. Brittingham to come in and talk to him about the incident. By way of written decision mailed August 17, 2010, the Board affirmed the Appeals Referee's determination that Mr. Brittingham had been terminated for just cause in connection with his employment. Mr. Brittingham filed a timely appeal of that decision to this Court.

Discussion

When reviewing the decisions of the Board, this Court must determine whether the Board's findings and conclusions of law are free from legal error and are supported by substantial evidence in the record.[1] "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[2] The Court's review is limited: "It is not the appellate court's role to weigh the evidence, determine credibility questions or make its own factual findings, but merely to decide if the evidence is legally adequate to support the agency's factual findings."[3]

Section 3314 of Title 19 of the Delaware Code provides, in pertinent part, that one shall be disqualified for unemployment benefits if he has been "discharged from [his] work for just cause in connection with [his] work."[4] "Generally, the term 'just cause' refers to a wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's expected standard of conduct."[5] Where a decision to

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[1] *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981); *Pochvatilla v. U.S. Postal Serv.*, 1997 WL 524062 (Del. Super.); 19 *Del. C.* § 3323(a) ("In any judicial proceeding under this section, the findings of the [Board] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.").

[2] *Gorrell v. Division of Vocational Rehab.*, 1996 WL 453356, at *2 (Del. Super.).

[3] *McManus v. Christiana Serv. Co.*, 1197 WL 127953, at *1 (Del. Super.).

[4] 19 *Del. C.* § 3314(2).

[5] *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967).

terminate an employee is based upon misconduct, the employer has the burden of establishing the misconduct.[6]

The Board held:

> Theft is an intentional act and is contrary to the Employer's interest, since it deprives the Employer permanently of the use or enjoyment of his property. There is no dispute between the parties that [Mr. Brittingham] committed the theft. While this is hardly the crime of the century, [Mr. Brittingham's] admission of the act does provide substantial evidence that the Employer had just cause to terminate the [Mr. Brittingham's] employment.

On appeal, Mr. Brittingham again admits that he did, in fact, take the oatmeal and raisins but alleges that other employees have engaged in theft of a larger scale and have not been terminated. Whether others may have committed theft and whether or not they were caught is not the issue before the Court. The Court agrees that the Board's decision is supported by substantial evidence and free from legal error.

Conclusion

In light of the foregoing, the Board's decision finding Mr. Brittingham was terminated for just cause in connection with his employment is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

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[6] *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at *3 (Del. Super. Feb. 7, 1996).

/s/ T. Henley Graves

oc: Prothonotory
cc: Unemployment Insurance Appeal Board
Twenty-Nine Corporation