IN THE SUPERIOR COURT OF THE STATE OF

DELAWARE IN AND FOR NEW CASTLE COUNTY

CLARENCE J. MALONE	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
	)	12A-01-018-JOH
v.	)	
	)	
ALLIEDBARTON SECURITY SERVICES, LLC. and UNEMPLOYMENT INSURANCE APPEAL BOARD	)	
	)	
Appellee	)	

Submitted: September 25, 2012
Decided: October 22, 2012

MEMORANDUM OPINION

Upon Appeal from the
Unemployment Insurance Appeal Board - ***AFFIRMED***

Appearances:

Clarence J. Malone, 42 Danbury Drive, Newark, Delaware, 19702, Appellant.

Kathleen Furey McDonough, Esquire, Lindsay O. Clizbe, Esquire, Potter, Anderson & Corroon, LLP, Wilmington, Delaware; Of Counsel: Brian Holladay, Esquire, Martenson, Hasbrouck & Simon, LLP, Atlanta, Georgia, Attorneys for Appellee, AlliedBarton Security Services, LLC.

HERLIHY, Judge

Clarence Malone has appealed the decision of the Unemployment Insurance Appeal Board denying his claim for benefits. The Board found that Malone, who was a security guard, had been terminated for "just cause" for failing to follow procedures regarding door alarms. Several months prior, he had been reprimanded for sleeping on the job. The evidence before the Appeals Referee, whose decision upon which the Board substantially relied, and the Board, involved issues of credibility. Such issues are matters for the Appeals Referee and the Board to resolve and not this Court. The findings of the Appeals Referee and the Board are **AFFIRMED**.

Factual Background

Malone was employed as a part-time security officer at Allied Barton Security Services, LLC ("Employer" or "Allied Barton") from September 25, 2010, until September 19, 2011. While employed with Allied Barton, Malone was assigned to work at Amazon.com, one of Allied Barton's clients. On the date of hire, Malone received a copy of the employee handbook, including the code of ethics. He signed his name and printed his name on the last page of the employee handbook. Among other things acknowledged on the receipt of the employee handbook was strict compliance with the policies and requirements of the Employer's handbook. Included in the employee handbook were acceptable standards pertaining to Malone's final warning and subsequent termination.

Additionally, the receipt indicated "disciplinary action, up to and including termination"[1] would result if the policies and requirements were violated.

On May 24, 2011, Malone received a write up for "[k]knowingly providing unacceptable service to a client."[2] The disciplinary statement describing the incident indicates that on May 24, 2011, Malone had fallen asleep while on duty as a screener and was noticed by an Amazon manager. The manager proceeded to remove the keys from the desk where he was sleeping. Malone did not wake up even after the keys to the building were removed.[3] The notice stated it was Malone's final warning. He agreed with the statements on the disciplinary document and signed the document on May 24, 2011.

Malone's next infraction led to his termination. On August 17, 2011, he was working at the desk at one of the sites when Amazon.com conducted an internal audit. The lost prevention manager for Amazon.com purposely performed a test on an exterior door. When this test is conducted, the alarm sounds and the alarm monitoring system is immediately alerted. Proper procedure required Claimant to respond by contacting another officer to check the alarm. This procedure was

[1] Record, at 8. (herinafter "R.").

[2] R. at 7.

[3] Malone alleged at the Appeals Referee hearing he fell asleep at work because he was suffering from lack of oxygen and poor circulation resulting from a double bypass surgery. R. at 26.

outlined in his signed employee handbook and during training. Instead of following Allied Barton's procedural requirements, Malone did not check the doors. After about five minutes of non-responsiveness, the alarm monitoring company contacted him, stated an alarm was sounding and asked if he knew who it was, or why the alarm was going off. Without contacting another officer or otherwise investigating the reason for the alarm, Malone assumed it was a contractor working on the door.[4]

Malone signed a disciplinary statement describing the alarm drill incident on August 18, 2011. He stated he agreed with the comments on the statement and conceded to making a mistake in handling the situation.[5] Malone was subsequently terminated as a result of "[g]ross [i]nsubordination or misconduct on company or client premises."[6]

A Claims Deputy determined Malone had been terminated for "just cause." The Appeals Referee held a hearing, at which Malone and an Employer representative testified. The Appeals Referee also held that Malone was

[4] Malone testified at the Appeals Referee hearing that he did not investigate the sounding alarm because he was advised by technicians that they would be working by the doors and the doors "might go off a couple of times." R. at 23.

[5] Claimant indicated the following on the disciplinary statement: "I agreed that I did made a mistake handling this occurrence." R. at 6.

[6] R. at 33.

discharged from his employment with "just cause" and was therefore, disqualified from receiving benefits. The Appeals Referee stated:

> Employees are hired to perform duties as required to the best of their ability and to adhere to the rules established by the employer in order to promote the business interests of the employer. Certainly, failing to follow a known employer procedure represents a reckless indifference to one's job duties and rises to the level of willful and wanton misconduct. This is the type of conduct that an employer does not expect nor does an employer have to tolerate.
>
> The claimant knew that when the alarms sounded he was supposed to get up and check out the reason. His failure to do so on August 17, 2011 was an intentional disregard for the employer's business interests. The claimant's actions rose to the level of willful and wanton misconduct. The employer had just cause to discharge the claimant and he is disqualified from receiving unemployment benefits.[7]

Malone appealed the decision to the Board and was the only witness. The Board held that Employer met its burden of proof by a preponderance of the evidence that Malone was discharged with "just cause." The Board, relying in part on the Appeals Referee's decision, affirmed. Malone appealed to this Court.

Parties' Contentions

Malone argues that he followed proper procedure on the day the internal audit was conducted. Specifically, he claims he did not leave the front desk to investigate the door alarm because: (1) two guards must remain at the desk at all times and he was the only guard on duty; and (2) he was advised by workers that

[7] R. at 31.

the alarm may sound. Malone asserted below, and on appeal, that when the alarm monitoring company did call, he followed proper procedure and was thus, terminated without "just cause."

Allied Barton argues the Board's decision is free from legal error and supported by substantial evidence in the record. Additionally, Allied Barton notes that the appeal requests the Court to reweigh evidence which is within the discretion of the Board.

Standard of Review

On appeal from a decision of the Board, this Court has a limited function of determining whether its conclusions are supported by substantial evidence and are free from legal error.[8] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] This Court's review is limited to the record below.[10] Where the Board affirms an Appeals Referee's decision after hearing additional evidence, this Court relies upon the referee's determinations for the findings of fact and conclusions of law.[11]

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[8] *Opportunity Ctr., Inc. v. Jamison*, 940 A2d 946 (Del. 2007) (TABLE).

[9] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)) (internal quotations omitted).

[10] *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

[11] *Boughton v. Div. of Unemployment Ins. of the Dep't of Labor*, 300 A.2d 25, 26 (Del. Super. 1972).

In reviewing a Board's decision for legal error and substantial evidence, this Court "does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility, and make its own factual findings and conclusions," as those functions are within the discretion of the Board.[12] The decision of the Board must be affirmed when there is no legal error and the decision is supported by substantial evidence.[13]

Discussion

The Board Did Not Commit Legal Error in its Decision

In Delaware, an employee is disqualified from receiving compensation so long as the employee was discharged for "just cause" in connection with the employment.[14] "Just cause" consists of a "willful 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."[15] An act is willful or wanton when the employee is "conscious of his conduct or recklessly indifferent to its consequences."[16] In assessing whether there was "just cause" associated with termination, employee

[12] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[13] *Olney*, 425 A.2d at 614.

[14] 19 *Del. C.* § 3314(2).

[15] *Mergliano v. Unemployment Ins. Appeal Bd.*, 2009 WL 3069676, at *2 (Del. Super. Sept. 16, 2009) (quoting *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. Oct. 24, 1967)).

[16] *Price v. Blue Plate Diner*, 2003 WL 21537924, at *2 (Del. Super. Apr. 4, 2003) (quoting *Coleman v. Dep't of Labor*, 288 A.2d 285, 288 (Del. Super. 1972)).

performance and conduct is highly relevant.[17] Additionally, "just cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination."[18] The employer bears the burden proving "just cause" for termination by a preponderance of the evidence.[19]

The Board did not commit legal error in its decision disqualifying Malone from receiving unemployment benefits. In its decision, the Board held Employer "met its burden of proving just cause for its discharge of the Claimant" based on the final warning and subsequent termination.[20] The Board properly articulated the standard for "just cause" and correctly applied that legal standard in rendering its decision. Accordingly, the Board did not commit legal error.

The Board's Decision is Supported by Substantial Evidence

Malone argues that he did follow proper procedures and was terminated without "just cause." Based on the proper standard of review, however, this Court does not reweigh evidence, make factual determinations, or decide issues of

[17] *Pinghera v. Creative Home Solutions, Inc.*, 2002 WL 31814887, at *2 (Del. Super. Nov. 14, 2002).

[18] *Pinghera*, 2002 WL 31814887, at *2.

[19] *West Center City Day Nursery, Inc. v. Hackett*, 1994 WL 637053, at *4 (Del. Super. June 14, 1994).

[20] R. at 52.

credibility. That role is left to the Board.[21] A review of the record in this case reveals there is substantial evidence in the record supporting the Board's finding that Malone was terminated from his employment with "just cause" and was thus, disqualified from receiving benefits. Allied Barton's witness testified that he received a final warning on May 21, 2011 for sleeping while on duty at the front desk. He signed the disciplinary statement and checked the box indicating he agreed with the statement. Then in August, Malone was terminated because proper procedures were not followed when a door alarm drill was conducted at the Amazon.com site. He again signed the disciplinary statement and acknowledged he did not properly handle the situation. Malone's testimony to the contrary, before the Appeals Referee and the Board, raised pure issues of credibility. Those decisions are not made or reviewed by this Court.[22] Thus, there is substantial evidence in the record before the Board to support its decision that he was terminated from Allied Barton with "just cause."

[21] *See State v. Dalton*, 878 A.2d 451, 454 (Del. 2005).

[22] *Dalton*, 878 A.2d at 454.

Conclusion

For the reasons stated herein, the decision of the Unemployment Insurance Appeal Board free from legal error and is supported by substantial evidence. Accordingly, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

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J.