IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MILDRED E. CASSIDY, Appellant, v. LIBERTY STAFFING and the UNEMPLOYMENT INSURANCE APPEAL BOARD. Appellees.	)	C. A. No.: N10A-11-007 CLS

Submitted: October 10, 2011
Decided: October 25, 2011

Upon Appeal from the Decision of
the Unemployment Insurance Appeal Board.
AFFIRMED.

ORDER

Mildred E. Cassidy, 2404 Paper Lane, Brandon, Wilmington, Delaware 19801. *Pro se*.

Charles J. Brown, III, Esquire, 300 Delaware Avenue, Suite 1370 Wilmington, Delaware 19801. Attorney for Appellee, Liberty Staffing.

SCOTT, J.

Introduction

Before the Court is an appeal from the Unemployment Insurance Appeal Board ("UIAB") decision finding that Appellant, Mildred Cassidy, ("Appellant") was terminated for cause and not entitled to unemployment benefits. Having reviewed the parties' submissions and the record below, the Court concludes that the UIAB's decision must be **AFFIRMED.**

Facts

From April 2009 until August 22, 2010, Appellant worked for Liberty Staffing ("Liberty"), a temporary staffing agency; she was assigned to work for Rexam as a production placer for $10.00 an hour. Liberty Staffing is a diverse workplace and disclosed during its orientation that it has a zero-tolerance policy regarding racism.

On August 21, 2010, Appellant showed three African American co-workers a text message picture of her grandson's Pit Bull dog.[1] Below the picture was the caption which read "here/this is my nigga dog."[2] The Appellant claimed at the Referee Board's hearing that, upon showing the picture to the second co-worker, Mary Williams ("Williams"), Williams

[1] The record also indicates that the pictures were shown to 2 co workers and a client instead of 3 co-workers.
[2] The record uses both words, "here" and "this"

notified the Appellant to refrain from showing the picture to anyone else.[3] The co-workers who viewed the picture found the caption offensive and the Appellant apologized. Appellant was notified on or about August 23, 2010, that Liberty terminated her employment "for the persistent use of racial slurs on Saturday[,] August 21, 2010."[4]

On August 31, 2010, the Claims Deputy held there was just cause for Appellant's termination, thus disqualifying her from receiving unemployment benefits. The Appeals Referee affirmed the Claims Deputy's findings on October 5, 2010. Appellant then appealed to the UIAB, which affirmed the lower decisions on November 10, 2010. A timely appeal was filed with this Court on November 23, 2010.

Issues on Appeal

Appellant raises three issues for the Court to consider: (1) whether the word "nigga" can rise to the level of racist and derogatory to conclude the UIAB had substantial evidence for its finding; (2) whether the Appellant's unawareness of the caption demonstrates there was not substantial evidence before the UIAB; and (3) whether the lack of a written or verbal warning provides a deficiency of evidence to reverse the UIAB's decision. This

[3] Williams, however, claims she was the third co-worker to view the photo and caption.
[4] R. at 1.

Court finds that there was substantial evidence in the record to affirm the findings of the UIAB on all three issues presented.

Appellant raises an additional issue that she was fired because of working extensive overtime and aiding a friend in his suit currently in federal court. Based on the appropriate standard of review, this Court is limited to the Referee and UIAB's record and will not review new claims raised on appeal.[5] Thus, the Court will not address this issue on appeal.

Standard of Review

The standard of review of a decision made by an administrative body is well established. This Court is limited in its review of factual findings and overall determination. "[T]he findings of the [UIAB] as to the facts, if supported by the evidence and in absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law."[6] This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.[7] The function of the UIAB is to resolve conflicts in testimony and evaluate witness creditability.[8]

"Reversal is warranted if the administrative agency exercised its power arbitrarily or committed an error of law, or made findings of fact

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[5] *Roshon v. Appoquinimink School Dist.*, 5 A.3d 631, at *4 (Del. 2010) (TABLE).
[6] 19 *Del. C.* § 3323(a).
[7] *Roshon v. Appoquinimink School Dist.*, 5 A.3d 631, at *2 (Del. 2010).
[8] *Id.*

unsupportable by substantial evidence."[9] Substantial evidence is relevant evidence that a "reasonable mind might accept as adequate to support [the] conclusion."[10] This standard requires more than a scintilla of evidence but less than a preponderance of evidence.[11] In determining whether substantial evidence exists to support the Board's decision, this Court must view the record in the light most favorable to the prevailing party.[12]

This Court, does not stand as the trier of fact. If the Board's ruling is supported by substantial evidence this Court will not substitute its own opinion for that of the Board's. Only where there is legal error can the decision of the Board be overturned.[13]

Discussion

Pursuant to 19 *Del. C.* § 3314(2), an individual is disqualified from benefits

> [f]or the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks (whether or not consecutive)

[9] *Olney v. Cooch*, 425 A.2d 610, 613 (Del. 1981) (quoting *Kresthool v. Delmarva Power and Light Co.*, 310 A.2d 649, 652 (Del. Super. July 9, 1973)).
[10] *Oceanport Ind. v. Wilmington Stevedores.*, 636 A.2d 892, 899 (Del. 1994)).
[11] *Olney*, 425 A.2d at 614.
[12] *Brommel v. Chrysler, LLC*, 2001 WL 4513086, at *3 (Del. Super. Oct. 28, 2010) (citing *E.I. DuPont De Nemours & Co. v. Fanpel*, 859 A.2d 1042, 1046-47 (Del. Super. Jan. 30, 2004).
[13] *Bradley v. State*, 2003 WL 22232814, at *4 (Del. Super. Sept. 16, 2003).

> and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount.[14]

The employer must prove claimant's termination for just cause by a preponderance of the evidence.[15] Preponderance of the evidence is defined as "on the side which the greater weight of evidence is found."[16] Just cause occurs where there is a "willful or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employee's expected standard of conduct.'"[17]

Willful or wanton conduct occurs when such conduct leads to a deviation from established and acceptable workplace performance.[18] This can either be a conscious action or reckless indifference.[19] Reckless conduct has been characterized as an "I don't care attitude."[20] It is unnecessary that the action be in bad motive or malice.[21] Just cause does, however, require notice that further behavior or performance may lead to termination.[22]

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[14] 19 *Del. C.* § 3114(2).
[15] *Kinswood Cmty. Ctr. v. Chandler*, 1999 WL 167772, at *2 (Del. Super. Jan. 19, 1999).
[16] *Taylor v. State*, 748 A.2d 914, at *1 (Del. 2000) (TABLE) (internal quotation marks omitted) (internal citations omitted).
[17] *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003) (quoting *Avon Prods., Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986)).
[18] *MRPC Fin. Mgmt. LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. June 20, 2003).
[19] *Id.*; *Barton v. Innolink Sys., Inc.*, 2004 WL 1284203, at *1 (Del. Super. May 28, 2004).
[20] *Porter v. Turner*, 954 A.2d 308, 312 (Del. 2008). .
[21] *Id.*
[22] *Barton*, 2004 WL 1284203, at *1.

I. There Is Substantial Evidence From the Record to Support the UIAB's Finding That the Term "Nigga" Was Racist and Derogatory.

Appellant submits that the term "nigga" cannot signify racism because it is not found in the dictionary. She argues that using the term "nigga," instead of "nigger," is similar to naming her dog "kite" because a Jewish person could find this offensive due to its similarity to "kike." This argument is meritless.[23] The term "nigga" is extremely offensive and unacceptable in any type of environment.

At the administrative hearing, the Referee heard testimony from the Appellant and three employer witnesses. The Appellant presented her argument that "nigga" is not derogatory because it is not contained in the dictionary. The UIAB found that "while the Claimant may not agree that the terminology was offensive or that she intended to offend her co-workers, her behavior was unacceptable for the workplace and regardless of intent, provide the Employer with just cause for terminating her employment."[24]

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[23] The term "nigga" is in the Oxford dictionary and represents a Southern U.S. pronunciation of "nigger." Therefore, it is substantially similar to "nigger." THE OXFORD ENGLISH DICTIONARY 401 (2d ed. 1989). The Court asked parties to comment on the definition in the dictionary available to the Court. However, the Court is reluctant to make a decision based upon this even though parties have responded. The Court is concerned that this is adding to the record below, which is impermissible.

[24] R. at 35.

The UIAB evaluated witness credibility and resolved conflicts of testimony to reach this conclusion. The UIAB did not err in concluding that the derogatory term used was racist because its decision was supported by substantial evidence in the record.

II. There is Substantial Evidence to Support the UIAB's Finding that Appellant Was Terminated for Just Cause Even Though She Claims She Was "Unaware" of the Caption.

Liberty was required to prove that Appellant was terminated with just cause by demonstrating a willful or wanton act in opposition to Liberty's interest or Appellant's duties or expected standard of conduct. This conduct can occur where there is reckless indifference; bad motive or malice is unnecessary.[25]

Appellant argues that she was unaware of the caption when she showed the pictures to three African American co-workers. Specifically, she claims that she did not know that her grandson wrote a caption under the picture before she showed the image. The Board considered Appellant's argument at the hearing but agreed, after the testimony presented that her conduct rose to the level of willful and wanton misconduct. There is substantial evidence supporting the UIAB's decision that she acted in reckless disregard by showing a picture with

[25] *Barton*, 2004 WL 1284203, at *1.

a racist caption to people working at her facility. Appellant's actions were reckless; she demonstrated an "I don't care attitude" when she showed the caption to three co-workers. Therefore, there is not legal error warranting reversal of the Board's decision on this finding.

III. The Lack of Written or Verbal Warning Does Not Suffice to Overturn the UIAB's Findings

To terminate an employee for just cause requires notice that further behavior or performance may lead to termination.[26] An employer may terminate an employee for violating a reasonable company policy.[27] An employee must be made aware of the policy's existence.[28] A two-step analysis is used when determining just cause: "1) whether a policy existed, and if so, what conduct was prohibited, and 2) whether the employee was apprised of the policy and if so, how was he made aware."[29] Knowledge of a company policy can occur through a written policy or where an employee was previously warned.[30]

Appellant argues in her appeal that she was not given notice of the policy because she did not have orientation. Therefore, she claims, she did not have knowledge of the zero-tolerance policy. The UIAB and the Referee found that

[26] *Barton*, 2004 WL 1284203, at *1.
[27] *McCoy v. Occidental Chem., Corp.*, 1996 WL 111126, *3 (Del. Super. Feb. 7, 1996).
[28] *Id*.
[29] *Id*.
[30] *Id*.

at the time of Appellant's employment, Liberty had a zero-tolerance policy regarding racism in place. While the company handbook does not contain information regarding its policy regarding racism, it is addressed before interviewing applicants during a phone screening process. In addition, UIAB and Referee found that the policy was discussed at orientation and employees were told that racism would not be tolerated. Therefore, not only was the policy in existence, but Appellant was apprised of the policy, at the very least, during her phone screening. Based on the appropriate legal standard of review of the record, there was relevant evidence presented that a reasonable mind would accept as adequate to support the conclusion that Appellant had notice of this policy.

Conclusion

Looking at the record in the light most favorable to the prevailing party below, this Court holds that there was substantial evidence in the record to support the UIAB's finding that the Appellant was terminated for "just cause." There was substantial evidence that the Appellant showed a picture with a derogatory caption to three African American co-workers. In addition, Liberty Staffing had a zero-tolerance policy regarding racism. The Appellant was informed of this policy. For the above-stated reasons, the Board's decision is hereby **AFFIRMED**.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.