IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MERCANTILE PRESS	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. 07A-07-006
	)	
SANDRA HUGHES	)	
	)	
Appellee.	)	

Submitted: September 23, 2008
Decided: December 23, 2008

MEMORANDUM OPINION

Carl D. Neff, Fox Rothschild LLP, Wilmington, DE, Attorney for the Appellant.

Sandra Hughes, Pro Se Appellee

In this matter an employer seeks to overturn a ruling of the Unemployment Insurance Appeals Board. Alternately the employer asks this Court to remand the matter to the U.I.A.B. for a new hearing in light of newly discovered evidence. The Court will discuss the employer's requests separately.

I. The Appeal

This case represents a lesson on the consequences of a party's decision to not participate in the hearing conducted by the Unemployment Insurance Appeals Board. Appellants in this Court are generally limited to arguments they have fairly presented to the lower tribunal, in this case the U.I.A.B. Because the employer chose not to attend the U.I.A.B. hearing, it is difficult, if not impossible, for it to show it preserved its arguments for appeal by fairly presenting them below. Accordingly this Court cannot, and will not, consider arguments in this appeal.

A. The Facts

The employer ("Mercantile") appeals from a decision of the Unemployment Insurance Appeals Board that Mercantile's former employee, Sandra Hughes, was entitled to unemployment benefits. Mercantile argues in large part that there was ample evidence in the record supporting the decision of the Appeals Referee, who ruled in favor of Mercantile. It also argues that the U.I.A.B. should have found – on the basis of Ms. Hughes' own testimony – that Ms. Hughes was insubordinate. Mercantile also contends that the U.I.A.B. incorrectly stated the law. Finally, Mercantile asks this Court to remand the matter so that it may present newly discovered evidence to the U.I.A.B.

The claimant, Ms. Hughes was first employed at Mercantile June 9, 1983. She worked as a typesetter and throughout most of her career at Mercantile had a spotless

disciplinary record. At some time not specified in the record, but presumably in 2006, Mercantile hired "Kelley," who was to be Ms. Hughes's assistant. This seems to be the start of Ms. Hughes's problems at Mercantile.

A good deal of friction developed between Ms. Hughes and Kelley. On November 20, 2006 Mercantile's president, Coleman Bye, held a meeting with Kelley and others (not including Ms. Hughes) in an effort to resolve the problems between Kelley and Ms. Hughes. Accounts vary, but it is clear that Ms. Hughes, though uninvited, entered the meeting in an agitated state.[1] The following day Mr. Bye met with Ms. Hughes and others. At this meeting Ms. Hughes apologized for her conduct and promised she would try to co-operate with Kelley. The relationship between Ms. Hughes and Kelley continued to deteriorate, however. The day after this second meeting Kelley came to read an email from Ms. Hughes to a Mercantile customer in which Ms. Hughes stated that Kelley was "digging her own grave" because of her typesetting errors.

Shortly after the meeting with Mr. Bye, Ms. Hughes took a leave from work on the advice of her physician.[2] She returned to Mercantile on March 1, 2007, at first working half-days. After returning to work, Ms. Hughes used Mercantile's email system to communicate with two of Mercantile's customers about presumably private matters. One email read as follows:

> "I'd like to speak with you confidentially sometime soon. Would it be ok for me to call you later when we can talk?"[3]

The other read:

[1] There is a dispute about exactly what was said, but because of the U.I.A.B.'s, and this Court's, resolution of the matter, it is not necessary to resolve that dispute.
[2] Up until this time Ms. Hughes had not been subjected to any disciplinary action by her employer.
[3] Record 11

> "Thank you for your welcome. I've been wanting to call you since I've been out, but didn't want to cause problems for you. I will be calling you sometime though, I'd like to talk to you confidentially."[4]

Mercantile was understandably upset when it learned of these emails. Ms. Hughes was summoned to a meeting by Mr. Bye on March 7, 2007 at which time she was told not to use the company's email system to contact outsiders about confidential matters. She promised not to do this, and the U.I.A.B. found that she complied. The U.I.A.B. also found that there was no discussion at the March 7 meeting about confrontations with employees. The March 7 meeting must have been tumultuous. There is evidence that Ms. Hughes was yelling during the meeting and stormed out twice only to be retrieved by cooler heads. Several days after the March 7 meeting, Ms. Hughes was suspended until further notice for sending the emails. She was terminated on March 22, 2007.

B. Mercantile's Reasons for Terminating Ms. Hughes

The U.I.A.B. observed that the "reasons for [Ms. Hughes'] termination are not clear from the record."[5] A Fact-Finding Statement submitted by Mercantile lists three instances of alleged misconduct:

- "3/2/07 two emails to customers regarding confidential conversations
- "11/22/06 email to client regarding another employee
- "11/20/06 burst into closed door meeting, after listening in and threatened another employee."

In a Separation Information Form, Mercantile advised the Department of Labor that Ms. Hughes was terminated for

> "inappropriate + hostile treatment of co-workers, voicing threats,

[4] Record 12
[5] Op. at 3

subordination of mgmt, misuse of co. time, unauthorized use of email."

Finally, in a letter to Ms. Hughes's union, Mr. Bye gave the following reasons for her termination:

- Inappropriate and hostile treatment of co-workers
- Voicing threats to the safety of co-workers
- Insubordination towards management
- Misuse of company time
- The unauthorized use of company equipment to arrange meetings with customers outside the workplace for "confidential" purposes, and also the fact that you tried to arrange such meetings with customers

C. The Procedural History of this Claim

Ms. Hughes filed a claim for unemployment benefits and shortly thereafter a Claims Deputy found that she was terminated without just cause and therefore entitled to benefits. The employer appealed and an Appeals Referee conducted a hearing at which Mercantile was represented by counsel. After the hearing the Referee issued an opinion in which he found in favor of Mercantile. It was now Ms. Hughes' turn to appeal, and she filed a timely appeal to the Unemployment Insurance Appeals Board. After the hearing the U.I.A.B. issued its opinion reversing the Referee and finding that Ms. Hughes was qualified to receive benefits. Mercantile chose not to participate in the hearing before the U.I.A.B.. As discussed below, that decision has significant consequences in the appeal before this Court.

D. Mercantile's Decision Not to Participate in the Hearing before the Board

The statutory process for resolving unemployment claims makes it clear that the General Assembly intended the U.I.A.B.–not the courts—to be the final arbiter in the vast majority of disputed unemployment claims. For example, that process requires that parties may not seek judicial review of a disputed unemployment claim unless they have

first presented that dispute to the U.I.A.B.[6] The statutory process further drastically limits the scope of this Court's review of the Board's decision,[7] and the courts are forbidden to enter a stay of the payments pending an employer's appeal.[8] This statutory framework achieves its purpose as relatively few U.I.A.B. decisions are appealed to this Court.[9]

It is important for a litigant to win before the U.I.A.B. This Court is by no means a rubber stamp of the U.I.A.B.'s decisions, but due in large part to the expertise of the U.I.A.B. and in smaller part to this Court's limited scope of review, relatively few of the appeals from the U.I.A.B. result in reversals. An informal survey shows that in calendar year 2008 to date only 5 of this Court's 31 decisions on appeals from the U.I.A.B. have resulted in reversals and remands.[10] In sum, the Appeals Board is the critical juncture in the process for resolving disputed unemployment claims.

It is against this backdrop that Mercantile chose not to participate in the hearing before the U.I.A.B. The reasons for that decision are not clear from the record. There is no explanation in Mercantile's brief before this Court, but its Notice of Appeal sheds some light on the matter. According to that Notice, Mercantile decided to forego participation in the hearing before the U.I.A.B. because "it had believed it had reached a global agreement with regard to Ms. Hughes relative to her employment … which agreement was disavowed by Ms. Hughes on *the morning of the hearing*." This cannot be accurate as written because Mercantile's Pennsylvania counsel wrote to the U.I.A.B. the

[6] 19 *Del. C.* sec. 3322(a)
[7] 19 *Del. C.* sec. 3323(a)
[8] 19 *Del. C.* sec. 3323(c)
[9] In FY2008 62 U.I.A.B. decisions were appealed to the Superior Court. Administrative Office of the Courts, *Annual Report and Statistical Information*.
[10] See Chart attached as Appendix hereto.

day *before* the hearing that he would not be appearing at the hearing. The record does not contain any indication that Mercantile sought a continuance of the hearing before the U.I.A.B. nor is there any explanation why counsel was not prepared to go forward despite the late collapse of settlement talks.

E. The Consequences of Mercantile's Decision not to Appear before the U.I.A.B.

There are significant consequences in this appeal to Mercantile's decision not to appear before the U.I.A.B. It has long been established that an appellate court will generally refuse to consider contentions not fairly presented to the tribunal below. Although Supreme Court Rule 8[11] currently embodies this principle, the principle predates Rule 8 and necessarily exists independently of that rule.[12] The Supreme Court has made it clear that this principle applies to the Superior Court when it is acting as an appellate court.[13] "This rule furthers the goal of permitting agencies to apply their specialized expertise, correct their own errors, and discourage litigants from reserving issues for appeal."[14] It is not surprising, therefore, that this Court routinely[15] refuses to consider arguments not raised in the lower tribunal when it is sitting as an appellate court,

[11] Rule 8 provides that "[o]nly questions fairly presented to the trial court may be presented for review; provided however that when the interests of justice so require, the Court may consider and determine any question not so presented." Mercantile does not argue that an interest of justice exception applies here.
[12] *Equitable Trust Co. v. Gallagher*, 77A.2d 548, 550 (Del. 1950).
[13] *Wilmington Trust Co. v. Conner*, 415 A.2d 773 (Del. 1980).
[14] *Down Under, Ltd. V. Delaware Alcoholic Beverage Control Commission*, 576 A.2d 675, 677 (Del. Super. 1989).
[15] *E.g., Small v. MBNA America*, 2008 WL 4365895 *2 (Del. Super. July 7, 2008) ("The appeals process limits this court to examining the issues the litigant presented to the tribunal below."); *Lewis v. Dep't of Agriculture* 2007 WL 315359, *4 (Del. Super. Jan. 31, 2007) ("When the Court acts in its appellate capacity on an appeal from an administrative agency, it is limited to the record and will not consider issues not raised before the agency").

including appeals from the U.I.A.B.[16] Because Mercantile chose not to participate in the hearing before the U.I.A.B., it is unable to show that it fairly presented its arguments to that tribunal.[17]

F. Analysis

The focus of this dispute are events occurring in two different time periods: November, 2006 and March, 2007. Mercantile devotes considerable portions of its brief to the November events and argues that these events justify its termination of Ms. Hughes. For example, Mercantile writes:

- "One of the first events of insubordination involved a meeting in November, 2006."[18]
- "Shortly after that meeting in late November, 2006 [sic: 2007][19] the Union also brought its own charges against Ms. Hughes."[20]
- "Ms. Hughes also confirms her participation in the conference call on or about November 27, 2006 [sic: 2007]"[21]
- Ms. Hughes "agrees that she 'broke into the meeting' on or about November 20, 2006. A description of Ms. Hughes's alleged conduct at that meeting follows.[22]
- "Ms. Hughes also confirms her participation in a conference call on or about November 27, 2006 [sic: 2007] involving a threat she made to a co-employee."[23]

Mercantile argues that "[s]omehow, the Board chose to ignore the above cited testimony before the Referee."[24] Mercantile's bewilderment at the U.I.A.B.'s analysis is misplaced. Mercantile failed to fairly present this issue to the U.I.A.B. and apparently hoped the

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[16] *O'Brien v. Unemployment Insurance Appeals Board*, 1993 WL 603363 (Del. Super. Oct. 20, 1993); *Delstar Industries, Inc. v. Delaware Dep't of Labor*, 1997 WL 27109 (Del. Super. Jan. 8, 1997).
[17] *See Garvey v. Garvey*, 2008 WL 5195352 (Del. Dec. 12, 2008) (Husband's arguments not fairly presented below when husband failed to appear at Family Court hearing).
[18] Op. Br. 6
[19] Throughout much of its brief Mercantile erroneously refers to meetings and conduct allegedly occurring in November, "2007." Ms. Hughes was long departed from Mercantile by then—she was terminated in March, 2007. The records show that the alleged events to which Mercantile refers must have taken place in November, 2006.
[20] Op. Br. 6
[21] *Id.* at 8.
[22] *Id.*
[23] *Id.*
[24] *Id.*

U.I.A.B. would do its work for it. It is not surprising, therefore, that the U.I.A.B. did not analyze the evidence the same way Mercantile does for the first time on appeal. For the reasons stated, this Court will not consider Mercantile's argument.

There is a second, and equally compelling, reason why Mercantile's argument fails. The U.I.A.B. held that the events on November, 2006 could not be used to justify Ms. Hughes's termination because Mercantile condoned them. The Board opined:

> "While the events of November 2006 may have provided a backdrop for the actions – and reactions – of the following March, they cannot be considered the cause of claimant's termination. To the extent that the claimant's actions 5 months prior to her termination were inappropriate, the Board concludes that the employer's lack of timely action constitutes condonation, which imposes upon the employer the duty to warn the employee that such actions will no longer be tolerated prior to terminating the employee for repetition of such behavior."[25]

Nowhere in its brief before this Court does Mercantile challenge the U.I.A.B.'s holding that Mercantile condoned Ms. Hughes's conduct in November 2006.

Because Mercantile has not challenged this ruling on appeal, it has waived any argument that it was incorrect. It is settled that an appellant waives any argument when it does not state fully state the grounds for the argument as well as apprise the reviewing court of the authorities which support that argument.[26] When an appellant's opening brief in an appeal fails to address a particular ruling by the Board, the appellant waives any claim that the ruling is error and is bound by it.[27] Having failed to challenge the U.I.A.B.'s holding that the events of November, 2006 cannot be used to justify Ms.

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[25] U.I.A.B.. Op. at 4

[26] *Roca v. E.I. DuPont de Nemours & Co., Inc*. 842 A.2d 1238, 1242 (Del. 2004)(argument considered waived when brief did not "fully state the grounds for appeal as well as the arguments and supporting authorities."); *Turnbull v. Fink*, 644 A.2d 1322, 1324 (Del. 1994)(same); *Von Feldt v. Stifel Financial Corp*., 714 A.2d 79, 866 (Del. 1998)(When a party fails to fully state an argument "we do not reach this issue and express no opinion on the decision of [the court below]"); *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008)("The failure to cite any authority in support of a legal argument constitutes a waiver of the issue on appeal.")

[27] *Martin v. Unemployment Insurance Appeals Bd.*, 2004 WL 772073 (Del. Super. Feb 25, 2004)

Hughes's termination, Mercantile is bound by that ruling. Consequently, this Court will not, and can not, consider Ms. Hughes's conduct in November, 2006.

Turning to the events of March, 2007, Mercantile focuses on two aspects of Ms. Hughes's behavior. First, it points to emails Ms. Hughes sent to two customers in which she stated she wanted to talk confidentially to them. Second, Mercantile points to Ms. Hughes's conduct during a March 7 meeting.

With respect to the two emails, the Board concluded that Mercantile had a policy prohibiting the use of the company's email system for personal reasons and that Ms. Hughes was aware of this policy. As would be expected, Mercantile agrees with these findings. The Board further concluded, however, that Mercantile was obligated to warn employees that violation of this policy could lead to termination. Because Mercantile did not provide such a warning, the Board reasoned, Mercantile could not rely upon the violations of that policy to justify its termination of Ms. Hughes. Although Mercantile devoted much attention to the email episode in its brief, for some unknown reason it chose to not even address U.I.A.B.'s ruling that Mercantile must show that Ms. Hughes was made aware of the consequences of a violation of the policy. For the reasons stated previously[28] this Court will not disturb that ruling because of Mercantile's failure to address it on appeal. Consequently, because there is no evidence in the record (and Mercantile points to none) that Mercantile ever made Ms. Hughes aware prior to March, 2007 that she could lose her job if she made personal use of the email system, this Court must leave stand the U.I.A.B.'s rejection of the personal email as a justification for Ms. Hughes's termination.

[28] Notes 26, 27 and text accompanying.

Mercantile also points to Ms. Hughes's behavior during a March 7 meeting Mr. Coleman called to discuss the two emails. Mercantile claims Ms. Hughes initially denied sending the emails and then became angry and raised her voice when confronted with copies. She allegedly yelled she did not "have to listen to this." Ms. Hughes stalked out of the meeting but was retrieved by one of the participants. According to Mercantile, Ms. Hughes walked in and out of the meeting on three occasions. Mercantile asserts that this was "the final straw and led to her suspension and termination."[29]

Mercantile claims that Ms. Hughes's behavior at the meeting constitutes insubordination. The U.I.A.B. held that "insubordination" is the refusal to obey the order of a supervisor. It concluded that there was no evidence that Ms. Hughes refused an order of a superior and therefore was not insubordinate, as that term was defined by the Board. On appeal Mercantile argues that the U.I.A.B's definition of "insubordination" was unduly narrow and that it should have expanded the definition to include "disrespectful behavior towards management." This argument is of no avail because it was never made to the U.I.A.B. Having provided no assistance to the U.I.A.B. in defining "insubordination," Mercantile cannot be heard on appeal to argue that the U.I.A.B. was wrong.

II. Mercantile's application for remand or reversal based upon newly discovered evidence

In its brief on appeal Mercantile seeks either a reversal or a remand for a new hearing based upon evidence it discovered after the hearing before the I.A.B. Mercantile claims to have found files on Ms. Hughes's computer at work which slow that Ms.

[29] Op. Br. 9

Hughes was using Mercantile time and facilities to perform printing services for her own customers.

In essence Mercantile is asking this Court to award it a new hearing or, alternatively, to remand the matter to the Board for consideration of its application for a new hearing. In order to obtain a new trial on the basis of newly discovered evidence, the moving party must show:

> (1) The new evidence is of such a nature that it would have probably changed the result if presented to the jury;
> (2) The evidence was newly discovered; i.e., it must have been discovered since trial, and the *circumstances must be such as to indicate that it could not have been discovered before trial with due diligence; and*
> (3) The evidence must not be merely cumulative or impeaching.[30]

"It is well-settled that a moving party must satisfy *all* [of those elements] before a motion for 'newly discovered evidence' will be granted."[31] Mercantile cannot do so.

After Mercantile filed its brief, this Court requested Mercantile to describe the circumstances under which the computer files were discovered and to explain why the files could not be discovered earlier.[32] Mercantile timely responded to the Court's request and provided a relatively detailed description of how the files were found. But, despite the Court's specific request, Mercantile provided no explanation why, with reasonable diligence, it could now have timely discovered the computer files.[33] There is evidence, therefore, upon which this Court could conclude that the ostensibly newly discovered evidence could not have been discovered with due diligence prior to the U.I.A.B. hearing. Mercantile's application is therefore denied.

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[30] *Hicks v. State*, 913 A.2d 1189, 1193-4 (Del. 2006) (emphasis added)
[31] *Doochack v. Hobbs*, 1994 WL 237597 *4 (Del. May 18, 994) (emphasis in original).
[32] Docket Item 13.
[33] Given that Mercantile was aware prior to March 7, 2007 that Ms. Hughes was apparently using her computer for personal emails, it seems odd that it did not timely search her computer for other evidence of misuse. Its failure to do so can hardly be said to amount to due diligence.

III. Conclusion

In a letter dated April 17, 2007 to the Department of Labor, Mr. Bye expressed his frustrations over Ms. Hughes's behavior and his inability to terminate her without Mercantile having to pay unemployment benefits. Mr. Bye wrote:

> I cannot believe in this day and age that anyone would condone such behavior. The potential to do permanent and irreparable damage to my business is extreme. If any of these customers were to be even slightly influenced by these statements it would be devastating to every employee who works here. If that were to happen the State would have 26 more unemployment claims to process. Additionally granting unemployment benefits is not only condoning this type of behavior, it makes a strong statement that anyone I employ can say anything or accuse me of anything they want to. My rights as a businessman and a person then are no longer valid.

In many respects the Court is sympathetic to Mr. Bye. But this Court is confined by the record presented to it and by well-established principles of appellate procedure. That record and the consequences of Mercantile's decision to forego participation before the U.I.A.B. require this Court to affirm the judgment of the U.I.A.B.. The judgment of the U.I.A.B. is therefore **AFFIRMED**. Mercantile's motion to remand for a new hearing on the basis of newly discovered evidence is **DENIED**.

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John A. Parkins, Jr.
Superior Court Judge

cc: Prothonotary

APPENDIX

Reported Superior Court UIAB appeal cases in 2008:

Case number	*Disposition*
07A-07-006 JAP	Affirmed
08A-02-012 PLA	Affirmed
07A-11-002 ESB	Affirmed
07A-12-006 FSS	Reversed and remanded
07A-12-005 MJB	Affirmed
07A-09-002 WCC	Affirmed
07A-07-007 PLA	Reversed and remanded
07A-10-003 JRS	Affirmed
07A-08-004 WLW	Affirmed
07A-07-001 WCC	Affirmed
07A-07-005 JRS	Affirmed
07A-10-008 MMJ	Affirmed
07A-05-008 JRJ	Affirmed
07A-06-005 RRC	Affirmed
07A-08-002 RFS	Reversed and remanded
07A-08-003 JRJ	Reversed and remanded
07A-12-001 PLA	Affirmed
07A-02-006 MJB	Affirmed
07A-02-003 SCD	Affirmed
07A-01-001 THG	Affirmed
07A-05-014 SCD	Affirmed
07A-04-002 WLW	Reversed and remanded
07A-07-007 WLW	Affirmed
07A-07-002 JTV	Affirmed
07A-05-003 THG	Affirmed
07A-05-002 ESB	Affirmed
07A-04-005 PLA	Affirmed
07A-06-002 RFS	Affirmed
07A-07-002 THG	Affirmed
07A-05-004 RFS	Affirmed
07A-05-005 ESB	Affirmed