IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

FREEDOM RIDES,	)	
	)	C.A. No.: K11A-02-002 TJV
Appellant,	)	
	)	
v.	)	
	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD, and CRYSTAL A. BLACKMAN,	)	
	)	
	)	
Appellees.	)	

Submitted: August 11, 2011
Decided: November 30, 2011

William J. Cattie, III, Esq., Rawle & Henderson, Wilmington, Delaware. Attorney for Appellant.

Noel E. Primos, Esq., Schmittinger & Rodriguez, Dover, Delaware. Attorney for Appellees.

Upon Consideration of Appellant's
Appeal From Decision of the
Unemployment Insurance Appeals Board
AFFIRMED

VAUGHN, President Judge

Freedom Rides v. UIAB
C.A. No.: K11A-02-002 JTV
November 30, 2011

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. This is an appeal from the Unemployment Insurance Appeal Board. The appellee/claimant, Crystal A. Blake, began working as a cashier/clerk for the appellant/employer, Freedom Rides, on October 5, 2009. On May 6, 2010 she acknowledged receipt of the company's employee handbook. The handbook provided that all non-business use of a company computer was prohibited. In June 2010 the claimant was disciplined for spending forty-one hours on non-work related websites over a period of two months. She was placed on probation for ninety days, warned that any violation of company policy during the probationary period would result in immediate termination, and scheduled for a progress meeting on July 27, 2010. She was given the same warning again on July 1, 2010, and was further informed that it was critical for her to be at work during her scheduled work hours, and that absence without appropriate reason was also cause for discipline up to and including termination.

2. On July 26, 2010 the claimant informed the employer that her doctor had ordered her not to drive or work until August 2, 2010 due to injuries received in an automobile accident. The claimant did not attend the previously scheduled July 27 progress meeting and did not call the employer about it or attempt to reschedule it. On July 29, 2010 she did go to the Delaware State Fair and posted that event to her Facebook page. The employer became aware of the trip to the Fair through the

Facebook page and terminated her employment on August 2, 2010. The statement of termination prepared by the employer mentioned the visit to the Fair, referring to it as an indication of dishonesty about her ability to report to work. The document further stated, in pertinent part, that the claimant showed repeated disregard for company policies, disregard for the terms of her probation agreement, and unreliability in reporting to work. The employer also contends that after the termination, it discovered that the claimant had spent a large number of hours on non-work related sites after June 24, 2010.

3. The claimant filed for unemployment benefits. A Claims Deputy found her disqualified from benefits because her violation of company policy justified her termination for willful or wanton misconduct. The claimant appealed to the Appeals Referee who reversed the Claims Deputy's decision. The Appeals Referee found that the claimant was terminated because she missed the July 27 progress meeting; that she had a medical excuse for not reporting to work that day for the meeting; that the medical excuse did not require her to remain confined at home; and that there was no evidence of willful or wanton misconduct associated with her absence from the July 27 progress meeting that would justify her termination.

4. The employer appealed to the Board which affirmed the Appeals Referee's decision. At the hearing before the Board, the employer contended that the claimant was terminated for a variety of disciplinary violations over an extended period of time, including, but not necessarily limited to, the non-business use of a company computer resulting in her probation, her failure to attend the July 27 progress meeting, her trip to the Fair on July 29, eating at her desk, poor performance on a

Promax system, poor performance generally, and occasional tardiness. The Board rejected the employer's contentions, finding that the claimant's failure to attend the July 27 progress meeting was the proximate cause of her termination and that non-attendance at the meeting was justified by her medical excuse. The Board also rejected an employer contention that the discovery, after termination, of non-business use of a company computer during the probationary period justified her termination.

5. On this appeal, the employer makes two contentions: (1) that the Board committed error by erroneously ruling that the claimant's attendance at the Fair was not just cause for termination; and (2) that the Board committed error by erroneously ruling that the discovery of non-business use of a company computer after her termination could not be a proximate cause of termination.

6. When reviewing decisions from the Board, the court is limited to consideration of the record which was before the administrative agency.[1] The court must determine whether the findings and conclusions of the Board are free from legal error and are supported by substantial evidence in the record.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to

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

[2] *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del. 1981); *Pochvatilla v. United States Postal Serv.*, 1997 WL 524062, at *2 (Del. Super. June 9, 1997); 19 *Del. C.* § 3323(a) ("In any judicial proceeding under this section, the findings of the [UIAB] 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.").

support a conclusion.[3] The court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] The reviewing court merely determines if the evidence is legally adequate to support the agency's factual findings.[5]

7. As mentioned, the employer first contends that the Board erroneously ruled that the claimant's attendance at the Fair was not cause for discharge. In support of his contention, the employer contends that if the claimant could find a way to attend the Fair, she should have found a way to attend the progress meeting, or at least to have offered an excuse for missing it; and her failure to attend the progress meeting, or at least contact her employer concerning it, under the circumstances, was willful or wanton misconduct justifying termination.

8. Pursuant to 19 *Del. C.* § 3314 an employee is ineligible to receive unemployment benefits if he or she has been terminated for just cause.[6] The term "just cause" refers to a wilful or wanton act in violation of either the employer's

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[3] *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

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

[5] *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003); *see also* 19 *Del. C.* § 3323(a) (providing that, absent fraud, the factual findings of the Board shall be conclusive and the jurisdiction of a reviewing court shall be confined to questions of law).

[6] The statute provides: "An individual shall be disqualified for 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 ...."

interest or of the employee's expected standard of conduct.[7] Wilful or wanton conduct is "that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance."[8] In a termination case, the employer has the burden of proving just cause.[9]

9. It is a fair inference from the record that the proximate cause of the claimant's termination was her attendance at the Delaware State Fair, coupled with her failure to attend the July 27 progress meeting. I find no error in the Board's conclusion that her attendance at the Fair was not willful and wanton misconduct creating just cause for her termination. The medical excuse restricted her from going to work at the time in question but did not confine her to home. According to the evidence, her boyfriend drove her to the fair, after about half an hour she began to feel ill, and after having dinner, they left. A letter from the doctor dated August 26, 2010 explains that the medical excuse did not confine her to home and was meant to keep her from exacerbating her injuries while on the job. The Board's conclusions that there was not a contradiction between her medical excuse from work and her attendance at the Fair, and that her attendance at the Fair did not violate either her

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[7] *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967); *Majaya*, 2003 WL 21350542, at *4.

[8] *MPCR Fin. Mgmt. LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. June 20, 2003).

[9] *Country Life Homes, Inc. v. Unemployment Ins. Appeal Bd.*, 2007 WL 1519520, at *3 (Del. Super. May 8, 2007); *Carter*, 2003 WL 21517977, at *4.

medical excuse or company policy and was not just cause for termination, are based on substantial evidence. Therefore, the employer's first contention is rejected.

10. The employer's second contention is that the Board erroneously ruled that the claimant's alleged use of a company computer for personal use during the probationary period and discovered only after her termination could not be a proximate cause of her termination. For this, the employer relies upon the case of *Smith v. Franklin.*[10] In *Smith* the employee represented in her resume and in her interview with the employer at the time she was hired that she had not worked for two years. This constituted a representation that she had not worked during her "base period." Since she had no wages during her base period, as represented by her, she would not be entitled to unemployment benefits if the employer terminated her, at least not until she had worked for the employer long enough that her base period fell within her period of employment with the employer. She was terminated after just less than three months because of issues at the work place having nothing to do with her resume or the representations made when she was hired. She then applied for unemployment benefits and the employer discovered only then that her representations that she had not worked for two years were false, that she did have wages from previous employment during the base period, and that she was eligible for unemployment benefits. At the Board level, the employer made two arguments: first, that he had just cause to terminate the claimant, and, second, that she should be estopped from collecting benefits due to her misrepresentations on her resume and

[10] 2004 WL 2830891, at *4 (Del. Super. Apr. 6, 2004).

during her interview regarding her lack of employment during the applicable base period. The Board ruled against the employer on the first argument, but did not address the second argument. On appeal, this Court concluded that the Board should have ruled on the estoppel issue and remanded the case to the Board so that it could do so. By implication, the Court concluded that the misrepresentation on the resume and in the interview, though discovered only after the claimant was terminated, could disqualify her from benefits. The employer in this case contends that under *Smith*, evidence discovered after the termination which could indicate wilful and wanton misconduct is relevant to the analysis, especially, where, as here, it is the same alleged conduct which resulted in her earlier probation, and that it should have been considered by the Board. The employer further contends that the principle it advocates has a common sense aspect as well. It contends that failure to consider misconduct discovered only after the employee is terminated may encourage employees to hide misconduct, knowing that doing so would not negatively impact an unemployment insurance claim. Thus, it contends, termination of an employee for what appears to be merely poor work performance may later be discovered to be poor performance influenced by company policy violations.

11. I am not persuaded that *Smith* is a precedent which should apply to this case. The case is heavily influenced by the estoppel theory involved there. There is no estoppel involved in his case. The Court may have considered the case differently if no estoppel was involved. I therefore reject the contention that *Smith* has precedential value in this case. I also find that the employer's remaining contentions related to it's *Smith* argument as summarized above are unpersuasive. Moreover,

the Board found that the employer failed to meet its burden of establishing that the claimant did, in fact, use the company computer for non-work related purposes after being placed on probation. The claimant testified that she did not, and the Board found her testimony credible. I have examined her testimony and the employer's evidence in support of this contention and I find that the Board's conclusion is supported by substantial evidence. For these reasons, this second of the employer's two contentions on appeal is also rejected.

12. The decision of the Board is ***affirmed***.

IT IS SO ORDERED.

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President Judge

oc: Prothonotary
cc: Order Distribution
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