**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

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| SERENA F. VON FEGYVERNEKY | ) | |
| | ) | |
| Appellant | ) | C.A. No. N11A-03001-RRC |
| v. | ) | |
| | ) | |
| CFT AMBULANCE SERVICE | ) | |
| | ) | |
| AND | ) | |
| | ) | |
| UNEMPLOYMENT INSURANCE APPEAL BOARD | ) | |
| | ) | |
| Appellees | ) | |

Submitted: April 3, 2012
Decided: June 28, 2012

On Appeal from a Decision of the Unemployment Insurance Appeal Board.
**AFFIRMED.**

## ORDER

Serena F. Von Fegyverneky, *pro se*

Seth J. Reidenberg, Esquire, The Chartwell Law Offices, LLP, Wilmington, Delaware, Attorney for Defendant

COOCH, R.J.

This 28th day of June, 2012, upon consideration of Appellant's appeal from an Unemployment Insurance Appeal Board decision, it appears to the Court that:

1. *Pro se* Appellant ("Employee") appealed an Unemployment Insurance Appeal Board ("UIAB" or "the Board") decision denying her unemployment benefits because her employer, CFT

Ambulance Service ("Employer"), proved Employee was terminated for "just cause." Employee argues the Board erred in disqualifying her from unemployment benefits because Employee attempted to contact Employer, reported for scheduled work shifts. She further argues that Employer's administrative appeal was untimely. The Court finds the Board did not abuse its discretion or legally err in finding that Employee's termination was for just cause. Accordingly, the Unemployment Insurance Appeal Board's decision disqualifying Employee from unemployment benefits is **AFFIRMED**.

2. Employee was employed by CFT Ambulance Service from May 2009 until September 2010. In approximately June 2010, Employee's schedule was modified at her request. On June 10, 2010 Employee submitted a request for a three week vacation from July 13 to August 4, 2010. Employer denied Employee's vacation request and stated that the duration requested would negatively impact the business's efficiency because it occurred during a particularly busy season. Employer also notified Employee that if she vacationed, Employee's hours could be greatly reduced or eliminated.

3. Employee proceeded with the unauthorized three week vacation, and upon return emailed Employer her work availability. Employer informed Employee that she was scheduled for work on August 20 and August 27, 2010. After Employee failed to report to work or call regarding her absence for the August 20 shift, Employer emailed Employee on August 26 to remind her of her scheduled shift on August 27. Employee failed to report for the August 27 shift or call regarding her absence. Employer sent a letter and email to Employee on September 2 asking Employee to verify her employment status with Employer within 72 hours. Employee sent text messages to her supervisor attempting to contact Employer. When this effort failed, Employee did not respond either through email or at Employer's location. Employer terminated Employee's employment on September 14, 2010, for job abandonment.

4. Employee filed a claim with the Claims Deputy requesting unemployment benefits in August 2010.[1] Employer argued, in response Employee should be disqualified from receiving unemployment benefits because she was terminated for just cause. Employee argued she made several attempts to contact Employer and that she only failed to appear for work shifts of which she was unaware.

5. The Claims Deputy found that Employee's behavior did not constitute wanton or willful misconduct, as required by 19 *Del. C.* § 3314(2).[2] Therefore, the Claims Deputy determined that Employee was not terminated for just cause and was entitled to receive unemployment benefits. The Claims Deputy's decision was mailed on October 6, 2010. The decision noted the last day to appeal was October 16. However, October 16 was a Saturday, therefore the last day to appeal pursuant to 19 *Del. C.* § 3318(b)[3]

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[1] 19 *Del. C.* § 3317(b) provides:

> Whenever an individual files a claim for benefits, the Department shall forward to the employer by whom the claimant was most recently employed … and to each base period employer relating to the individual's claim a separation notice. The last and base period employer(s) shall return such notices completed, indicating the reason for the claimant's separation from work with them and the individual claimant's last date of work with them, within 7 days of the date contained on the separation notice.

Employee filed a claim for unemployment benefits in August 2010, yet Employee was not terminated from CFT Ambulance Service until September 2010. It is unclear why Employee would apply for unemployment benefits before she was terminated, and how this discrepancy was overlooked through all previous administrative review. Regardless, Employee's filing for unemployment benefits one month before her termination lends support for Employer's job abandonment claim.

[2] 19 *Del. C.* § 3314(2) provides disqualification for unemployment benefits when the employee is discharged for just cause. Just cause is shown by an employee's wanton or willful misconduct. *Majaya v. Sojourner's Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003) (citations omitted). Wanton and willful conduct "is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance." *MRPC Financial Management LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. June 20, 2003).

[3] 19 *Del. C.* § 3318(b) provides: "Unless a claimant or a last employer who has submitted a timely and complete separation notice in accordance with § 3317 of this title files an appeal within 10 calendar days after such Claims Deputy's determination was mailed to the last known address of the claimant and the last employer, the Claims Deputy's determination shall be final."

was Monday, October 18.[4] Despite that deadline, Employer appealed the Claims Deputy's decision to the Appeals Referee on October 20.

6. Employer's appeal to the Appeals Referee was heard on November 18, 2010. The Referee reversed the Claims Deputy's decision. The Appeals Referee found that Employee was properly disqualified from unemployment benefits because she had been terminated for just cause. At no time in the Appeals Referee's findings did the Referee address the fact that Employer's appeal was untimely.[5]

7. The sole question Employee raised on her appeal before the UIAB was whether Employer had terminated Employee for just cause. The UIAB concluded Employer proved by a preponderance of the evidence that Employee was terminated for just cause. Accordingly, the UIAB disqualified Employee from unemployment benefits. The UIAB found Employer had provided substantial evidence supporting the claim that job abandonment constituted just cause for Employee's termination. Employee then filed this instant appeal with this Court.

8. Before this Court, Employee contends the UIAB erred in disqualifying her from unemployment benefits because: (1) Employee attempted to contact Employer; (2) Employee reported for work after returning from vacation, but Employer refused to schedule her for work shifts; and (3) Employer's appeal of the Claims Deputy's decision to the Appeals Referee was untimely.[6]

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[4] 19 *Del. C.* § 3304 provides: "When the day, or the last day, for doing any act required to be done falls on Saturday, Sunday or a holiday, the act may be done on the first ensuing day that is not a Saturday, Sunday or holiday."

[5] Despite noting at the hearing both the date the Claims Deputy's decision was mailed and the date Employer's appeal was filed, the Referee stated Employer's appeal was timely. The Referee's finding of timeliness controverts 19 *Del. C.* § 3304 and 19 *Del. C.* § 3318(b).

[6] Employee raised five arguments in her Reply Brief: (1) that Employee made several attempts to contact Employer with no response from Employer; (2) that Employee reported for work upon returning from vacation, but Employer refused to schedule her for work shifts; (3) that Employer's appeal from the Claims Deputy's decision to the Appeals Referee was untimely; (4) that a former co-worker would testify that Employer stated, "We will do everything in our power to make sure that she won't get unemployment

Employee seeks instatement of unemployment benefits.

9. Employer contends the UIAB's decision was supported by substantial evidence and was free of legal error. Employer argues it attempted to contact Employee by email, letter, and telephone without any response from Employee. Several of Employer's attempts to contact Employee by email and letter are in the record. Employer contends substantial evidence exists supporting the Board's finding that Employer proved by a preponderance of the evidence that Employee was terminated for just cause.

10. Secondly, Employer contends its appeal to the Appeals Referee was filed timely. Employer argues that Employee has waived any timeliness argument because Employee failed to raise the argument before the Board or the Appeals Referee. Employer also argues that its appeal was timely because the Claims Deputy decision was dated October 6 and the appeal was docketed on October 20. Relying upon 19 *Del. C.* § 3318(b), Employer apparently claims that October 20 is within 10 calendar days after October 6 and is therefore timely.[7]

11. "[T]he findings of the Unemployment Insurance Appeal 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."[8] Superior Court review "is limited to a determination of whether there was substantial evidence sufficient to support the [Board's] findings."[9] Substantial evidence requires, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[10] This Court determines if the UIAB abused its discretion, it does not weigh evidence or make fact determinations.[11] An administrative

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benefits;" and (5) that Employee offers testimony from employees and former employees regarding her work ethic and availability. This Court need not reach the last two arguments because they are irrelevant considering the standard of review.

[7] *See infra* ¶ 15.

[8] 19 *Del. C.* § 3323(a).

[9] *Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

[10] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1944).

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

agency's decision is an abuse of discretion if "it is based on clearly unreasonable or capricious grounds" or "the Board exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."[12]

12. To demonstrate "just cause," the employee's behavior must amount to 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."[13] Wanton and willful conduct "is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance."[14] "[J]ust cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination."[15]

13. This Court acknowledges that Employee sent text messages to her supervisor in an effort to contact Employer. However, Employee should have made further effort to contact Employer through alternative means or by physically reporting to Employer's location to obtain scheduling information. There is no evidence to support Employee's claim that she went to Employer's location to obtain information. Nor has Employee adduced sufficient evidence to support her claim that she appeared for scheduled work shifts or attempted to communicate with Employer beyond text messaging. Employee's mere claims, without further evidence, do not negate Employer's substantial evidence supporting just cause for Employee's termination.

14. Conversely, the record provides substantial evidence supporting the Board's finding that Employer had just cause for termination based on Employee's wanton or willful misconduct. The Board did not abuse its discretion in assessing the weight and credibility

[12] *Martin v. Unemployment Ins. Appeal Bd.*, 2004 WL 772073, at *2 (Del. Super. Feb. 25, 2004) (citations omitted).
[13] *Majaya v. Sojourner's Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003) (citations omitted).
[14] *MRPC Financial Management LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. June 20, 2003).
[15] *Pinghera v. Creative Home Solutions, Inc.*, 2002 WL 31814887, at *2 (Del. Super. Nov. 14, 2002).

given to evidence because the Board's conclusions were not unreasonable or capricious. Just cause for Employee's termination is easily found in the record: (1) Employee took an unauthorized three week vacation, despite notice that her hours could be greatly reduced or eliminated as a result; (2) Employee failed to report for work following her unauthorized three week vacation; (3) Employee failed to communicate with Employer other than through text messages; and (4) Employee failed to respond to Employer's email, letter, and telephone correspondence. Substantial evidence supports the reasonable conclusion that Employee's behavior constituted just cause for termination.

15. Although Employee correctly argues that Employer's appeal to the Appeals Referee was untimely, Employee has waived that argument because she did not raise it before the Appeals Referee or the UIAB. Claims which are not presented before the UIAB may not be first raised on Superior Court appeal, unless the interests of justice so require.[16] The interests of justice do not require this Court to consider Employee's timeliness argument because Employee was on notice of the Referee's error[17] and Employee herself untimely appealed to the UIAB. The Board only granted an exception for Employee's untimely appeal because she demonstrated she had not received the Appeals Referee's decision until after the 10 day deadline. For these reasons, it is reasonable to infer that Employee was aware of the timeliness argument at the UIAB hearing, yet neglected to raise it. Most notably, Employee cannot invoke the interests of justice when the substance of her appeal is meritless. Substantial evidence supports the Board's finding that Employee was terminated for just cause. Moreover, the record suggests Employee abandoned her job, considering

[16] *Roshon v. Appoquinimink Sch. Dist.*, 2010 WL 3855179, at *4 (Del. Oct.4, 2010).
[17] Employee participated in the hearing when the Referee both noted the dates of the Claims Deputy decision mailing and Employer's appeal filing, and erred in stating that Employer's appeal from the Claims Deputy's decision was timely. "Litigants, whether represented by counsel or appearing *pro se,* must diligently prepare their cases for trial or risk dismissal for failure to prosecute. There is no different set of rules for *pro se* plaintiffs, and the trial court should not sacrifice the orderly and efficient administration of justice to accommodate an unrepresented plaintiff." *Draper v. Medical Center of Delaware*, 767 A.2d 796, 799 (Del. 2001).

Employee filed for unemployment benefits before she was terminated.

16. The Unemployment Insurance Appeal Board did not abuse its discretion by disqualifying Employee from unemployment benefits because there is substantial evidence to support the conclusion that Employee was terminated for just cause. The Unemployment Insurance Appeal Board also did not err as a matter of law. Therefore, the decision of the Unemployment Insurance Appeal Board is **AFFIRMED.**

**IT IS SO ORDERED.**

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Richard R. Cooch, R.J.

cc: Prothonotary