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

CAROLYN J. MARTIN,	)	
	)	
	)	
Appellant,	)	
	)	
v.	)	**C.A. No. N11A-11-005 MJB**
	)	
	)	
DELAWARE SUPERMARKETS, INC. AND UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	
	)	
	)	
Appellees.	)	

Submitted: May 7, 2012
Decided: July 5, 2012

Upon Appellant's Appeal from the Unemployment Insurance Appeal Board's Decision.
AFFIRMED.

OPINION AND ORDER

Carolyn J. Martin, *pro se*, Appellant.

Gregory B. Williams, Esquire and Mian R. Wang, Esquire, Fox Rothschild LLP, Wilmington, Delaware, Attorneys for Appellee Delaware Supermarkets, Inc.

Caroline L. Cross, Esquire, Deputy Attorney General, Wilmington, Delaware, Attorney for Appellee Unemployment Insurance Appeal Board.

BRADY, J.

INTRODUCTION

Carolyn J. Martin ("Martin") was employed as a deli clerk by ShopRite Supermarkets (owned by Delaware Supermarkets, Inc.) (hereinafter "ShopRite") from May 6, 1999 through May 26, 2011.[1] On May 28, 1999, Martin signed a certificate indicating receipt of ShopRite's employee handbook, which set forth ShopRite's policy on reporting absences.[2] On March 5, 2010, Martin received a warning for failure to report to work and failure to notify management of the same. The warning set forth that further violations of this nature would result in termination.[3]

On May 22, 2011, Martin failed to report to work and did not call in to notify management. Instead, Martin maintains that she "texted" a coworker and asked the coworker to notify management of her absence. Martin says that she could not call in because she could not talk due to laryngitis. Martin maintains that the coworker showed the text message to a supervisor.[4] Martin admits that it was not ShopRite's policy that employees could report absences by "texting;" however, Martin maintains that it was common practice and was accepted by ShopRite.[5]

ShopRite's representative, Jennifer Selvaggi ("Selvaggi"), and assistant store manager Pat Cathcart ("Cathcart"), a witness for ShopRite, both denied any knowledge that Martin had texted a coworker to report her absence. Both Selvaggi and Cathcart

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[1] Record at 30 (hereinafter "R.").
[2] ShopRite's handbook states: "Associates must telephone the designated store Management personnel at least one (1) hour prior to the scheduled shift to advise that they are unable to report to work as scheduled" and "The failure to call in prior to absences or lateness as outlined above may result in disciplinary action, up to and including termination." R. at 15.
[3] Martin also wrote a handwritten comment on the warning, indicating that she understood that it was her responsibility to notify a supervisor of an absence. *Id.* at 30.
[4] *Id.* at 53
[5] At the hearing before the Appeals Referee, Martin testified regarding "texting" to call in an absence that "it's not a policy in our handbook, but it's something that several people has [*sic*] done in the deli and it's been accepted." *Id.* at 53.

confirmed that texting to report an absence is not accepted under ShopRite policy.[6] James Leonard ("Leonard"), ShopRite's human resources director, testified that there is not a policy that permits reporting an absence by texting, although Leonard could not say whether or not it had ever been done at a particular store.[7]

Martin returned to work on May 23, 2011. Martin claims that she brought medical documentation with her on that day.[8] According to Martin, the note was seen by Linda Stansbury ("Stansbury"), who acts as a supervisor when the regular supervisor is absent.[9] Martin testified that Stansbury told her to show the documentation to supervisor Sharon Dericola ("Dericola") and that the note was later misplaced and Martin could not get another note because her records were not in the computer at the hospital.[10]

Martin's testimony is unclear regarding when exactly the note disappeared and whether or not the note was ever seen by Dericola. In her testimony before the Appeals Referee, Martin first says, "The only person that saw that note was Linda Stansbury."[11] But later in the testimony, Martin later states that she "showed Sharon [Dericola] the papers."[12] In her testimony before the Appeal Board, Martin claimed, "I showed [Stansbury] the documents and she said go in and give them to Sharon [Dericola]. I was putting on my shoes and I also left [the papers] right there on the counter. When I come [*sic*] back, they were gone. But Linda Stansbury did see those documents. I showed them

[6] *Id.* at 54.
[7] *Id.*
[8] R. at 73.
[9] *Id.*
[10] Martin claims that her records were not in the hospital computer because she only saw a nurse and not a doctor. *Id*. at 52.
[11] *Id.*
[12] *Id.*

to her. And when I went into the break room where Sharon [Dericola] was, I had them right there on the table."[13]

Martin says that Cathcart first asked her for a doctor's note on the day she returned to work (Monday, May 23, 2011), but that she was not able to reply to him because she could not talk.[14] The following day, Tuesday, she did not see Cathcart because he was not working that day. The following day, Wednesday, Martin was not scheduled to work and so did not come in. It was Thursday, May 26, 2011, when Martin spoke with Cathcart again. He asked her for the doctor's note and she indicated that she did not have it.[15] Martin alleges that Cathcart immediately started "hollering and screaming" at her in response.[16] Martin maintains that Cathcart hollered at her on the sales floor, embarrassing her in front of customers and coworkers and it was only after Cathcart started hollering at her, that Martin hollered back at him.[17] In her Opening Brief, Martin also alleges that Cathcart refused to ask Stansbury about having seen Martin's medical excuse.[18]

Cathcart puts forth a slightly different version of events.[19] According to a form, "Employer's Warning Notice Corrective Review," completed and filed by Cathcart on May 27, 2011, Cathcart first asked Martin for a doctor's note on Monday, May 23, 2011. Martin did not respond to Cathcart, but "looked like she couldn't talk."[20] Cathcart was

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[13] *Id.* at 73. Perhaps Martin meant that she showed Dericola that she had the papers but Dericola did not read the content of the papers. Otherwise, Martin's testimony is inconsistent. Neither Stansbury nor Dericola were called to testify either before the Appeals Referee or the Appeal Board.
[14] R. at 47.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 72.
[18] Appellant's Opening Br. at 4.
[19] Cathcart's version of these events is consistent with written statements from three employees claiming to be present on May 26, 2011. R. at 19-22.
[20] *Id.* at 18.

off from work on Tuesday and Martin was off on Wednesday. On Thursday, May 26, 2011, Cathcart approached Martin and again asked for the doctor's note. Cathcart claims Martin suddenly started yelling at him and that he "started to get loud back."[21] He then called Martin upstairs to the office. There, Cathcart again asked for the note and Martin "started yelling at [him] for no reason."[22] Cathcart "started getting loud back then just told [Martin] to go home […] she is suspended pending termination."[23] Cathcart wrote on the "Employer's Warning Notice Corrective Review" form that Martin "is being suspended pending termination due to not being able to produce a note to [Cathcart] after being asked 3 times. Also, for yelling at a manager."[24]

On June 15, 2011, the Claims Deputy granted Martin benefits, finding that she was terminated without just cause.[25] The Claims Deputy's holding was based on presumption that "the employer must prove just cause for discharge" and the finding that ShopRite did not adequately demonstrate Martin's misconduct.[26] ShopRite appealed and a hearing was held before the Appeals Referee on July 18, 2011.[27] Reversing the decision of the Claims Deputy, the Appeals Referee found Martin was terminated with just cause and hence ineligible for unemployment benefits. Specifically, the Appeals Referee found that the employer had shown by a preponderance of evidence that Martin was discharged with just cause.[28] The Appeals Referee found that Martin's not reporting to work on May 22, 2011 and not calling in to report the absence constituted "a reckless

[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] R. at 24.
[26] *Id.*
[27] *Id.* at 27.
[28] *Id*. at 30, citing *Taylor v. State*, 2000 WL 313501, at *2 (Del.) (holding that the employer must show by a preponderance of evidence that the claimant was discharged for just cause in connection with his work).

disregard for the employer's interests, especially in light of the fact that claimant had a history of such behavior and she received a final warning which indicated that she would be terminated for repeated conduct of this nature."[29]

Martin appealed to the Unemployment Insurance Appeal Board ("the Board") and a hearing was held on September 28, 2011, at which the Board affirmed the factual and legal findings of the Appeals Referee.[30] The Board found that Martin was aware of ShopRite's policy on reporting absences and her failure to comply constituted "willful and wanton misconduct," providing ShopRite just cause to terminate Martin.[31] The Board concluded that because Martin was terminated with just cause, Martin is ineligible for unemployment benefits.[32] On November 4, 2011, Martin appealed the Board's decision to Superior Court.[33]

PARTIES' CONTENTIONS

Martin contends that ShopRite's claim that she was fired for absenteeism is pretextual. She maintains that she was fired mainly for speaking back to a supervisor.[34] Martin claims that she did not have a problem with absenteeism, citing a March 2011 evaluation stating that Martin "was dependable, at work on time."[35] She also claims that other employees were not reprimanded or fired for similar conduct.[36] Because she was

[29] R. at 31.
[30] *Id.* at 66.
[31] *Id.* at 67.
[32] *Id.*
[33] *Id.* at 79.
[34] Appellant's Opening Br. at 1.
[35] *Id.* at 2.
[36] Martin claims to have witnessed firsthand two other deli employees who had been no call/no show four or five times yet had never been reprimanded on the floor in front of customers or coworkers as Martin claims she was. *Id*. Martin also cites examples of other employees she claims had worse absentee records before being fired. *Id.* at 3.

previously praised for being dependable and because other employees were not reprimanded for similar or worse absenteeism, Martin argues that the real reason for her termination was talking back to a supervisor.[37]

ShopRite asks that the Court affirm the decision of the Board, citing the deferential standard under which a court is to review a Board decision. ShopRite argues that there was sufficient evidence in the record to support the Board's finding that Martin engaged in willful or wanton conduct and hence was fired with just cause.[38]

STANDARD OF REVIEW

The standard under which a court reviews a decision of the Board is deferential.[39] The Board's decision is only to be disturbed in very limited circumstances.[40] So long as the Board's conclusions are (a) supported by "substantial evidence"[41] in the record[42] and are (b) "free from legal error,"[43] the Board's decision must stand—even if the court itself would have decided otherwise.[44] The Board's decision will be overturned only if the Board "acts arbitrarily or capriciously" or "exceeds the bounds of reason."[45]

Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[46] Substantial evidence requires "more than a

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[37] *Id.*
[38] *Id.* at 5.
[39] 29 *Del. C.* § 10142.
[40] *Delaware Transit Corp. v. Roane*, 2011 WL 3793450, at *6 (Del. Super. Ct.).
[41] *See Unemployment Ins. Appeal Bd. v. Duncan*, 337 A.2d 308 (Del. 1975).
[42] Under 29 *Del. C.* § 10142(d), this Court's present review is limited to matters of law and bound by the facts in the record.
[43] *See Longobardi v. Unemploymt. Ins. Appeal Bd.*, 293 A.2d 295 (Del. 1972).
[44] *Delaware Transit Corp.*, 2011 WL 3793450 at *6.
[45] *Id.* at *6 (citing *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at *2 (Del. Super. Ct.)).
[46] *MBNA America Bank, N.A. v. Capella*, 2003 WL 1880127, at *2 (Del. Super. Ct.) (citing *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994).

scintilla but less than a preponderance" to support the finding.[47] The court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[48] The court's role is merely to determine if the evidence is legally adequate to support the agency's factual findings.[49]

DISCUSSION

Under 19 *Del. C.* § 3314(2), an individual is disqualified from receiving unemployment insurance benefits when the individual was terminated with "just cause."[50] Just cause is defined as a "willful or wanton act in violation of either the employer's interests, or the employee's duties, or of the employee's expected standard of conduct."[51] Specifically, "a willful act is one that 'implies actual, specific, or evil intent,' while a wanton act is one that is 'heedless, malicious, or reckless, but does not require actual intent to cause harm.'"[52]

Concerning absenteeism, the court has held that an isolated attendance problem probably does not constitute just cause.[53] Specifically, the court has held no just cause in an isolated incident where employee has not been warned and where it appears that employer tolerated previous actions of similar severity without warning.[54] However,

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[47] *Id.* at *2 (quoting *Onley v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[48] *Id.* at *2 (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. Super. Ct. 1986).
[49] *Keim v. Greenhurst Farms*, 2001 WL 1490060, at *2 (Del. Super. Ct.) (citing 19 *Del. C.* § 3323(a)).
[50] 19 *Del. C.* § 3314(2) provides that an individual shall be 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) and has earned wages in other employment equal to not less than 4 times the weekly benefit amount.

[51] *Keim*, 2001 WL 1490060, at *2 (citing *Abex Corp. v. Todd*, 235 A.2d. 271, 272 (Del. Super. Ct. 1967)).
[52] *Smoke v. Coventry Health Care*, 2011 WL 2750711, at *2 (Del. Super. Ct.)
[53] *See Weaver v. Employment Sec. Commission*, 274 A.2d 446, 447 (Del. Super. Ct. 1971); *Boughton v. Division of Unemployment Ins. of Dept. of Labor*, 300 A.2d 25, 27 (Del. Super. Ct. 1972).
[54] *Weaver*, 274 A.2d at 447-48 (reversing the Appeal Board's denial of benefits to employee terminated for absenteeism because there was no evidence of warnings prior to the employee's dismissal). The Court

where the employee received adequate warning[55] and/or there was a known company policy, the court has held repeated absenteeism to be "willful and wanton" violation of the "employer's interests" and the "employee's duty."[56]

There is substantial evidence that Martin's conduct was both "willful or wanton" and "in violation of either the employer's interests, or the employee's duties, or of the employee's expected standard of conduct."[57] Martin knew, or should have known, that not showing up for her shift as scheduled and not following proper "call in" protocol was a violation of the employer's interests, the employee's duties, or the expected standard of conduct. Martin not only signed indicating receipt of ShopRite's employee handbook, [58] but also acknowledged ShopRite's policy regarding absences on the March 2010 warning.[59]

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observed that cases where absenteeism has been found just cause for termination almost invariably involve prior warnings. *Id.*

[55] In *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981), the Court held that claimants were rightfully denied unemployment benefits after being terminated for leaving work early. In this case, claimants requested permission to leave work early. Permission was denied and claimants were "explicitly warned that their failure to remain at work through their scheduled shift would result in termination of the employment." *Id*. at 1266. The Court suggested that a true emergency might occasion an exception (excusing the claimants disobedience) but that there was no true emergency in the case. *Id.* at 1267. *See also Pinghera v. Creative Home Solutions, Inc.,* 2002 WL 31814887, at *2 (Del. Super. Ct.) (holding that "just cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination").

[56] *See Keim*, 2001 WL 1490060, at *2 (finding that "the [employer] had a clear policy of requiring its drivers to call the office on Sundays to obtain their assignments for the following Monday." The claimant violated this company policy and was terminated with just cause).

[57] *Id.* at *2 (citing *Abex Corp. v. Todd*, 235 A.2d. 271, 272 (Del. Super. Ct. 1967)).

[58] R. at 58-59. *See Smoke v. Coventry Health Care*, 2011 WL 2750711 at *2 (holding that "an employee handbook outlining conduct that constitutes grounds for termination is sufficient to establish company policy" and that "evidence that an employee received the employee handbook is sufficient to establish that the employee was made aware of company policy." There is just cause for termination when an employee violates established company policy of which the employee has been made aware). In *Smoke*, just as in the instant case, the handbook makes clear that violations of the policy may result in termination. The court found this sufficient to establish company policy. *Id.* at *3. Further, in both cases, the employee signed acknowledging receipt of the handbook. The court found the signature sufficient to establish that the employee was aware of the policy. *Id.* at *3.

[59] R. at 62. Martin handwrote comments on the March 5, 2010 notice indicating that she understood that it was her responsibility to call management to report an absence. *Id.*

Next, the Court considers whether ShopRite previously tolerated the sort of behavior for which Martin was terminated. Where an employer previously accommodated or tolerated certain conduct, "fundamental fairness require[s] an unambiguous warning" to the employee that future like conduct will result in termination.[60] Without such a warning there is no just cause.[61]

Martin's testimony in the record and opening brief suggests that, in her view, (a) she was not adequately warned that her job was in danger and (b) ShopRite tolerated similar or worse absenteeism from other employees.

First, the Court considers the argument that Martin was not adequately warned. Although Martin does not make this argument explicitly, she suggests it in pointing out a positive work evaluation that she received in March 2011 (roughly two months before her termination).[62] However, Martin received an unambiguous warning, dated March 5, 2010, that further absenteeism may result in termination.[63] Martin might have hoped that the subsequent positive evaluation in March 2011 somehow mitigated the effect of the March 2010 warning, leaving her with the impression that perhaps she had not placed her job in jeopardy. However, it is very clear that Martin indicated on the "Claimant Fact-Finding Sheet," dated June 2, 2011, that she had received warnings and/or was aware of company policy regarding absenteeism.[64] This admission indicates unequivocally that

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[60] *Oritz v. Unemployment Insurance Appeal Board*, 317 A.2d 100, 101 (Del. 1974).
[61] *See Hocker Mfg. Co. v. Mort*, 1991 WL 190417 (Del. Super. Ct.); *Diamond State Port Corp. v. Ferguson*, 2003 WL 168635 (Del. Super. Ct.).
[62] R. at 72. The evaluation is only briefly mentioned by Martin in her testimony before the Appeal Board and does not otherwise appear in the record. Martin mentions the evaluation in more detail in her opening brief and suggests that the positive evaluation led her to believe that her performance was satisfactory. Appellant's Opening Br. at 2. Specifically, Martin asks rhetorically, "if I was a constant call outer why did my supervisor give me my evaluation in March of 2011 that stated I was dependable, at work on time, knew my job, [and] good with customers [?]" *Id.*
[63] R. at 62.
[64] *Id*. at 11.

Martin was aware, even after the March 2011 positive evaluation, that absenteeism may result in termination.

Second, the Court considers Martin's claim that ShopRite tolerated absenteeism by other employees. In her testimony before the Appeals Referee, Martin claims that it was common practice for employees to "call-in" absences by "texting."[65] However, the evidence in the record is such that a reasonable person could conclude that such conduct had never been tolerated by ShopRite. Other than her assertion, Martin presented no witnesses or other evidence that calling in by texting had been tolerated. Furthermore, she has not alleged any specific incidents or dates of such occurrences, only that "everybody in the deli has done that [i.e., send a text message to report an absence] at one time or another."[66] According to the testimony of ShopRite's human resources manager, ShopRite's human resources director, and the assistant store manager at Martin's store, "texting" was not an accepted form of reporting an absence.[67] The Board, as the finder of fact, is within its authority to credit the testimony of ShopRite's witnesses over that of Martin.

CONCLUSION

There is substantial evidence in the record from which a reasonable person could conclude that Martin was terminated with just cause and is therefore ineligible for

[65] *Id*. at 53. Later, in Appellant's opening brief, Martin gives the names and histories of several other store employees who she alleges had much worse attendance records but yet were not reprimanded or terminated. Appellant's Opening Br. at 3-4. But because the Court's review is limited to matters of law and bound by the record, additional information that was not presented to the Appeal Board will not be considered. *See* 29 *Del. C*.§ 10142(d) ("The Court's review… shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency"). *See, e.g*., *Petty v. University of Delaware*, 450 A.2d 392, 396 (Del. 1982).
[66] R. at 53.
[67] *Id.* at 53-54.

unemployment benefits, as was concluded by the Board. Because there is substantial evidence and no error of law, the decision of the Board is **AFFIRMED**.

IT IS SO ORDERED.

_____/s/_____

M. Jane Brady
Superior Court Judge