IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

STEVEN M. COURY,	)	
	)	C.A. No. 09A-02-001 (JTV)
Employee-Appellant,	)	
	)	
v.	)	
	)	
LOWE'S HOME CENTERS, INC.,	)	
	)	
Employer-Appellee,	)	
	)	
and	)	
	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD OF THE STATE OF DELAWARE,	)	
	)	
Appellee.	)	

Submitted: May 21, 2009
Decided: August 31, 2009

John S. Grady, Esq., Grady & Hampton, LLC, Dover, Delaware. Attorney for Appellant.

Jennifer Gimler Brady, Esq. and Jennifer Wasson, Esq., Potter, Anderson & Corroon, LLP, Wilmington, Delaware. Attorneys for Appellee Lowe's Home Centers, Inc.

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

VAUGHN, President Judge

OPINION

Steven M. Coury appeals an Unemployment Insurance Appeal Board decision finding that he was discharged from his employment at Lowe's Home Centers, Inc. on the basis of just cause, and that he was therefore disqualified from receiving unemployment benefits. Based on the parties' submissions and the record of the case, the Court affirms the Board's decision denying benefits to Mr. Coury.

FACTS

The appellant was employed by Lowe's as a commercial sales specialist in its Camden, Delaware store from August 26, 2005 through June 16, 2008. The appellant's primary job was to handle the store's business sales, but periodically, he was asked to cover the cash register in the commercial sales area. The appellant testified that he was never formally trained on the register, as the full-time cashiers were.

The appellant's ultimate termination from Lowe's resulted from three instances of mishandling customers' checks while he was covering the commercial sales cash register. On March 8, 2008, the appellant processed a check for $113.24, and then returned the check to the customer along with the receipt. The appellant was counseled about this incident, and an Employee Performance Report was filled out. The report stated: "Any further violation will result in disciplinary action up to and including termination." The appellant read and signed the report. On April 5, 2008, the appellant again handed a check back to a customer, this time in the amount of $26.90. An Employee Performance Report was filled out and marked "Final Notice." The appellant signed this report, which also stated that any further violation would

result in "documentation up to and including termination." After both infractions, the appellant was re-educated about the correct procedures for taking and processing customers' checks. On May 26, 2008, the appellant returned a check to a customer in the amount of $43.41. At that point the appellant was terminated. His Final Notice indicated that he had been counseled on two separate occasions regarding the same conduct, and Lowe's could not continue to accept further losses.[1]

The appellant filed for unemployment benefits on June 16, 2008. The Claims Deputy found that Lowe's had demonstrated wilful or wanton misconduct on the part of the appellant, and thus the appellant was disqualified from receiving unemployment benefits. The Appeals Referee affirmed, holding that the appellant had adequate warning of a possible termination based on his errors, that he then failed to take special care in handling customer payments, and that his actions were wanton misconduct supporting a finding of just cause. The appellant appealed to the Unemployment Insurance Appeal Board. A hearing was held on December 10, 2008, and the Board issued its opinion on January 31, 2009. The Board affirmed the decisions below and concluded that the appellant was terminated for just cause and was therefore ineligible for unemployment benefits. The instant appeal followed.

PARTIES' CONTENTIONS

The appellant contends that the three cash register incidents in question were

[1] The appellant's final Termination Report stated: "Steve Coury was discharged due to repeatedly handing personal checks back to customers that were given to him as payment for goods purchased." The Report cited "money shortages in the cash register as well as a financial loss to the store."

honest, inadvertent mistakes involving relatively small amounts of money, and thus they did not constitute just cause for termination. The appellant points to the fact that Timothy Grote, a sales manager at Lowe's, testified that the appellant was a good employee with no history of problems other than the check-returning incidents. The appellant further argues that the existence of previous warnings did not automatically convert the appellant's honest mistakes into wanton and wilful conduct, and that the focus should be on whether the appellant's conduct was intentional, or "made on purpose or in some reckless manner." The appellant claims that the Referee, and then the Board, erred as a matter of law in applying a standard for just cause that disregarded the fact that the appellant's conduct was unintentional. The appellant likens his errors to a typing or clerical error, which, he argues, would not constitute just cause for dismissal despite a prior warning from the employer. The appellant submits that the issue of a warning is a "red herring" in the context of an inadvertent mistake.

Even under the proper standard of review, the appellant contends, the Board lacked substantial evidence to find that the appellant's conduct was wilful and wanton. The appellant concludes that he was neither conscious of his conduct nor recklessly indifferent to the consequences of returning checks to customers, and that Lowe's acknowledged that he had committed "honest mistakes."

Lowe's counters that the Board applied the proper legal standard in determining whether the appellant was eligible for unemployment benefits. Lowe's cites Delaware case law for the proposition that an employee's receipt of a warning of possible termination is relevant to the just cause analysis. Lowe's also notes that

the Board did not find that the appellant's repeated instances of misconduct, despite warnings, constituted just cause as a matter of law; rather, the Board used discretionary language in finding that the appellant's actions satisfied the just cause standard.

As to the appellant's argument that the Board should have focused on whether his conduct was intentional, Lowe's contends that the appellant has proffered an incorrect legal standard, and the concept of "wanton misconduct" does not require a showing of bad motive or intent to cause harm. Lowe's submits that the Board's finding of just cause was supported by substantial evidence, taking into account the facts that (1) the appellant caused financial loss to Lowe's on three separate occasions; (2) the first and second violations were followed by written warnings; (3) the appellant's violations were all captured on surveillance video; (4) the appellant was counseled as to the correct money handling procedures after the first two violations; and (5) the appellant knew that he had to take special care when handling customer payments.

STANDARD OF REVIEW

The scope of review of findings of the Unemployment Insurance Appeal Board is limited to a determination of whether there was substantial evidence sufficient to support the Board's findings.[2] Substantial evidence is defined as "such relevant

[2] *Unemployment Ins. Appeal Bd. of Dep't of Labor v. Duncan*, 337 A.2d 308, 308-09 (Del. 1975).

evidence as a reasonable mind might accept as adequate to support a conclusion."[3] On appeal, the court does not weigh evidence, determine questions of credibility, or make its own factual findings.[4] If there is substantial evidence and no mistake of law, the Board's decision must be affirmed.[5]

DISCUSSION

The Board's decision to deny unemployment benefits to the appellant was premised on its finding that the appellant was discharged for just cause under 19 *Del. C.* § 3314.[6] The term "just cause" denotes a wilful or wanton act in violation of either the employer's interest, the employee's duties, or 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] It does not require a showing of bad motive or

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[3] *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003).

[4] *Id*.

[5] *City of Newark v. Unemployment Ins. Appeal Bd.*, 802 A.2d 318, 323 (Del. Super. 2002).

[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 . . . ." 19 *Del. C.* § 3314(2).

[7] *Moeller v. Wilmington Sav. Fund Soc'y*, 723 A.2d 1177, 1179 (Del. 1999); *Tuttle v. Mellon Bank of Del.*, 659 A.2d 786, 789 (Del. Super. 1995); *Abex Corp. v. Todd*, 235 A.2d 271, 271 (Del. Super. 1967).

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

malice.[9] In a termination case, the employer has the burden of proving just cause.[10]

The appellant in this case claims that his check-returning violations were inadvertent mistakes. To satisfy the just cause standard, courts require more than mere inadvertence on the part of the employee.[11] Moreover, courts will not uphold a denial of benefits if the employee's unsatisfactory performance was the result of incapacity or inexperience.[12] However, the cases make clear that *negligent* performance can rise to the level of wilful or wanton misconduct, particularly where "it occurs despite warnings and is not excusable as an expected result of either the nature of the job or of the ability of the employee."[13] Whether an employee's mistakes continued despite warnings of their impropriety, and whether the mistakes were excusable as an expected result of the job or of the employee's ability, are important considerations in determining whether an employee's careless errors fall

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[9] *Id.*; *Coleman v. Dep't of Labor*, 288 A.2d 285 (Del. Super. 1972).

[10] *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.

[11] *See Country Life Homes*, 2007 WL 1519520, at *2 ("Inadvertence in isolated instances or good faith errors in judgment do not equate to just cause for termination."); *Abex*, 235 A.2d at 272 ("[T]he Commission's findings of inadvertence, if proper, are sufficient to negate 'just cause.'").

[12] *See Starkey v. Unemployment Ins. Appeal Bd.*, 340 A.2d 165, 167 (Del. Super. 1975) ("Where a conscientious employee is not able to perform to the satisfaction of his employer due to a limited physical or mental capacity, inexperience, or lack of coordination, and is thereby discharged, he is nevertheless entitled to unemployment compensation.").

[13] *Glass v. Unemployment Ins. Appeal Bd.*, 1994 WL 555467, at *2 (Del. Super. Sept. 15, 1994).

within the "zone of conduct that is wilful or wanton."[14]

In this case, Lowe's concedes that the appellant's violations were not intentional. Shane Cornett, the Human Resource Manager at the branch, testified on this point.[15] Tim Grote, the sales manager, represented to the Board that the appellant was a good employee aside from the check-returning incidents. To claim that the appellant's acts were "honest mistakes," however, and that therefore the employer's warnings were ineffectual, is to minimize the appellant's deviation from acceptable workplace performance and to sidestep the authorities holding that even careless or negligent mistakes can give rise to just cause for termination. Moreover, the appellant downplays the repeated nature of his infractions, which, contrary to counsel's assertion before the Board, caused tangible, monetary harm to Lowe's.

The Board found the case of *Jeffers v. The Lensfest Group*[16] to be controlling. In that case, a customer service representative for a cable company was terminated for logging an excessive number of "short calls," or calls that were considered unanswered or unresolved, despite warnings from the employer. The employee had received at least one documented warning, and she was also counseled about proper

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[14] *Fed. St. Fin. Serv. v. Davies*, 2000 WL 1211514, *3-*4 (Del. Super. June 28, 2000). Other cases illustrate the significance of a prior warning. *See Carter*, 2003 WL 21517977, at *4 ("Just cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination."); *Tuttle*, 659 A.2d at 790 n.4 ("One factor utilized in determining 'just cause' is whether an employee received a prior warning.").

[15] Cornett stated: "I do recall saying that nobody is saying that you're giving money back intentionally."

[16] 2001 A.2d 884149 (Del. Super. Aug. 3, 2001).

customer service protocol at weekly team meetings. The court affirmed the Board's finding that the employee's pattern of short calls, in combination with a final incident where she failed to answer her phone at all, constituted wanton misconduct in violation of her duties and the employer's interests.[17] The Board also cited *Barrios v. Perdue*,[18] in which a poultry plant employee was discharged following several acts of misconduct. The employee had received both written and verbal warnings prior to his termination. The court's decision to deny unemployment benefits was guided by the facts that the employer gave repeated warnings of the employee's unsatisfactory performance, the "tasks to which he was assigned were relatively simple," and "inexperience was not a factor in his poor performance."[19] While the court found that the employee's failure to draw every third bird from the line was an isolated incident that could not be considered wilful, it concluded that the multitude of infractions together satisfied the standard for just cause. Other cases support the proposition that, if an employee is on notice of his misconduct, and is on notice that he may face termination, his continued misconduct may be considered wanton or wilful and thus just cause for termination.[20]

Jeffers and *Barrios* govern a case like this, where the employee received

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[17] *Id*. at *3-*4.

[18] 1995 WL 562147 (Del. Super. Aug. 17, 1995).

[19] *Id*. at *3.

[20] *See Whaley v. Unemployment Ins. Appeal Bd.*, 1994 WL 233984 (Del. Super. May 4, 1994).

written and verbal warnings of his violations, was on notice of the possibility of termination,[21] and continued in a pattern of misconduct that was not expected as a result of either the employee's job or his ability level. The appellant's attempt to distinguish *Jeffers* on the grounds that the employee in that case exercised "control" over her actions, whereas the appellant's actions were inadvertent, is unpersuasive. The appellant did control the manner in which he handled customers' checks, and he should have exercised even greater care and control after he was warned of his unacceptable performance. Moreover, the cases discussing the importance of a prior warning or warnings do not differentiate between intentional and unintentional acts: the cases merely note that *isolated incidents* of inadvertence cannot be considered wilful or wanton. There is no support for the appellant's theory that "[i]f the mistakes were made inadvertently because the claimant was distracted, then that should make a significant difference to [the fact finder]."[22] The Board here appropriately

[21] It bears noting that the Lowe's Human Resources Management Guide gives management the authority to impose corrective action, up to and including termination, for "Class 'B' violations that are not serious when considered separately, but when grouped together indicate a pattern of unacceptable behavior." Class B violations are defined to include "[u]nproductive behavior, inefficiency and/or negligence in the performance of assigned duties." The Guide prescribes that Class B violations be handled with a written warning for a first offense, a final warning for a second offense, and termination for any subsequent offense.

[22] The appellant contends that the Board did not appropriately consider the factors in *Federal Street Financial Service v. Davies*, namely, (1) whether the mistakes continued despite warnings of their impropriety, and (2) whether the errors were excusable as an expected result of either the nature of the job or the ability of the employee. *Davies*, 2000 WL 1211514, at *4. The appellant then claims that "if the case were remanded, the appropriate question should be were the mistakes made because of carelessness of the employee or were the honest mistakes of an otherwise good employee." The *Davies* test clearly excludes any reference to the intentionality or inadvertence of the employee's conduct, and the appellant cites no other authority on this

emphasized that the appellant's check-returning practice was not an isolated incident, and that the totality of the infractions, combined with the two unequivocal warnings, converted the termination to one for just cause:

> [The Board] does find the Claimant's repeated acts of returning the customer's payment for merchandise to the customer to be in violation of the Employer's interest and the Claimant's duties and expected standard of conduct. Had the Claimant committed a solitary act of this sort, it may have been considered a single incident of poor judgment not meriting discharge. The Claimant had two prior incidents of such negligent behavior and was on notice that another such incident could result in termination. . . . Whatever the Claimant's employment status at any particular time, the Claimant knew or should have known, even without the April 6th warning, that giving the Employer's money back to the customer [was] 'a deviation from established and acceptable workplace performance.'[23]

The Court finds that the Board applied the proper legal standard for determining whether there was just cause for the appellant's termination, and it based its just cause determination on substantial evidence. The appellant's failure to take

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point. Moreover, in his Reply Brief, the appellant inappropriately references the definition of "wanton" in the punitive damages context, claiming that "9 out of 10 Superior Court judges" would likely deny punitive damages to Lowe's if this was a negligence case. The standard of wantonness as it applies to punitive damages, and the two personal injury cases cited by the appellant, bear no relevance in the unemployment insurance context.

[23] *Coury v. Lowe's Home Centers, Inc.*, UIAB Appeal No. 40059474, at 3 (Dec. 10, 2008).

due care in handling customers' checks after being warned of the consequences constituted reckless indifference to his duties and to the employer's interests. The Board's decision denying unemployment benefits is hereby ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
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