

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

TOMIE KAY MORSE, :
 :
 Appellant, :
 :
 v. : C.A. No. 09A-03-002-RFS
 :
 BRANDYWINE ASSISTED LIVING, :
 :
 Appellee. :

ORDER

*Upon Appeal of a Decision of the Unemployment Insurance Appeals Board.
Affirmed.*

Submitted: August 19, 2009
Decided: September 25, 2009

G. Kevin Fasic, Esquire, Wilmington, Delaware, attorney for Appellant.

Pro Se Appellee.

This is the Court's decision on an appeal from the Unemployment Insurance Appeals Board ("UIAB" or "Board"). Claimant Tomie Kay Morse appeals the Board's denial of her petition for unemployment benefits after her termination from Brandywine Assisted Living ("Brandywine" or "Employer"). For the reasons explained below, the Board's decision is affirmed.

FACTS

Claimant worked as Employer's Arts and Entertainment Director from March 2006 through August 2008. Her duties included planning and executing events for the patients in the facility, overseeing the volunteer program and interacting with patients' families. A new Executive Director, Holly Rolt, started to work in August 2007. She observed the members of her management team and gave each one, including Claimant, a list of her expectations for their work. As she watched Claimant's progress, she saw certain problems. She noticed that Claimant had problems with completing the planning of any event, such as forgetting to arrange the bus for a lunch outing and failing to come to the Super Bowl party. Claimant's staff had difficulty communicating with Claimant. Ms. Rolt and Claimant had a discussion concerning her work in February 2008, and Claimant was given a warning regarding personal use of her computer.

According to the Director, the problems continued, both with event planning and with communication with staff, family members and volunteers. In April 2008, Claimant received a performance evaluation and a 90-day improvement plan, which listed her most

crucial areas of improvement to be better planning for activities, expanding the volunteer program and leading her team by improving communication. Claimant's staff had been complaining about a lack of communication, a lack of supplies, and inadequate planning, so a meeting was held to address these issues. On June 30, the Executive Director met with Claimant about a problem with confidentiality. Claimant had been heard telling other employees that she was on an improvement plan and was not getting a raise. Management viewed this as poor behavior from someone in a leadership position. Claimant was given a 30-day action plan, which indicated that her planning skills were improving and that volunteer numbers were up, but that communication with staff was still an issue, as well as lack of confidentiality, lack of professionalism, and an inability to admit being wrong. The action plan stated that a failure to improve would result in termination.

In mid August, Ms. Rolt asked Claimant if she had any events planned for National Assisted Living Week, which had been discussed as long ago as February 2008, and which is an important week for Employer. Claimant had nothing specific to offer. She came up with a generalized calendar of events within a few days, but her staff was unaware of the proposed events. At this point, Ms. Rolt felt she could not have Claimant on the job during the most important week of the year with nothing planned. Claimant was terminated from her position.

Claimant believed that she did whatever the Ms. Rolt asked her to do but that she could simply not meet her expectations. She felt that the Director prejudged her. Claimant stayed under budget and her staff had their schedules a month ahead of time. The software she added to her computer was to create work calendars. She believed that the Director was unprofessional in such behaviors as giving Claimant a mug that said “Smarta***.” Claimant believed that she was terminated because she added her family members to the healthcare program after her marriage in July.

POSTURE

After her termination, Claimant filed for unemployment benefits Division of unemployment Insurance. The Claims Deputy found that Employer met its burden of showing just cause for termination and that Claimant was disqualified from receiving benefits. Claimant appealed to the Appeals Referee, who held a hearing and affirmed the decision of the claims referee. Claimant appealed to the UIAB, which also held a hearing. The Board accepted the evidence presented to the referee and heard additional testimony from Claimant, Ms. Rolt and Ms. Lisko, the Human Relations Director, who was present at the termination and some of the meetings. The documents presented at the hearing include the termination letter of August 2008, the 30-day action plan of July 2008, the 90-day plan of April 2008, and various documents related to misuse of her computer in March 2008. The Board affirmed the decision of the Referee, and this appeal followed.

ISSUES

Claimant argues first that the Appeals Referee's decision was erroneous because it rested on undocumented testimonial evidence of Employer's witnesses. Claimant argues second that the Board was arbitrary and capricious in finding that there was evidence of poor performance after the July Action Plan. Claimant argues third that because Employer had addressed the issues of planning and communication with Claimant in the April 90-day Plan, those issues could not serve as just cause for termination.

THE BOARD'S DECISION

The Board agreed with the decision of the Appeals Referee, correctly noting that the issue was whether Employer had met its burden of showing just cause,¹ namely wilful and wanton conduct on the part of the Claimant for the discharge.² The Board found that because Claimant admitted signing the Action Plan nothing leading up to it should be considered. The Board stated that the issue is limited to non-compliance with the Action Plan and that there was just cause based on failure to complete the Plan despite repeated warnings. The Board concluded that Employer met its burden of proof that Claimant was discharged for just cause and was therefore disqualified from receipt of benefits.

¹Title 19 *Del. C.* § 3341(2).

²*Bear-Glasgow Dental, L.L.C. v. Edwards*, 2007 WL 1651988 (Del. Super.) (citing *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super.1967)).

STANDARD OF REVIEW

This Court's review of an administrative decision is limited. The Court must determine whether its findings and conclusions are free from legal error and supported by substantial evidence in the record.³ Substantial evidence means relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁴ The Court does not weigh the evidence, determine questions of credibility or make its own factual findings.⁵ The Board may affirm the decision of the appeals referee on the basis of the evidence previously to the appeal tribunal.⁶ The findings of the Board as to the facts, if supported by the evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.⁷

DISCUSSION

Claimant argues first that the Appeals Referee erred in accepting testimony that was not supported by written documents. Claimant seems to object to all testimonial evidence that is not bolstered by documentation, and seems to think that all such evidence is hearsay. Testimony about events observed first-hand is admissible direct evidence. Furthermore, the UIAB is not strictly bound by the rules of evidence and may consider

³*Unemploymnet Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del 1981).

⁴*Anchor Motor Freight v. Ciabottoni*, 716 A.2d 154, 156 (Del. 1998).

⁵*Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

⁶*See* 19 Del. C. § 3320.

⁷*See* 19 Del. C. § 3323(a).

hearsay along with other competent evidence.⁸ Claimant herself presented the testimony of Pete Owens, a volunteer whose testimony was not accompanied by any documentation. Most telling is the fact the April Action Plan and the June Action Plan, which were the written reflections of warnings given to Claimant by Rolt, were admitted into evidence and helped establish the facts. The Court finds no error in the evidence presented to the Appeals Referee.

Second, Claimant argues that the Board was arbitrary and capricious, and abused its discretion, in finding evidence of poor performance after the June Action Plan. The testimony from Ms. Rolt and Ms. Tracy Lisco was that Morse had no specific plans for National Assisted Living Week when Mr. Rolt asked her about it in August 2008. The event was scheduled for September, and notices about it had been appearing since February 2008. Claimant's failure to have planned any events constituted non-compliance with the June Action Plan, which Claimant had signed. The Court finds that the Board was not arbitrary or capricious and did not abuse its discretion in making this finding.

Third, Claimant argues that allegations of poor planning prior to the June Action Plan cannot be used to establish just cause for termination because it had been addressed in April. That is, Claimant seems to argue that Employer had condoned her conduct from April through June and therefore could not terminate her for failure to plan the events for

⁸*Filanowski v. Port Contractors*, 2007 WL 64758 (Del. Super.).

National Assisted Living Week. In fact, this Court has held that a written warning followed by 15 instances of tardiness prior to discharge did not constitute Employer's acquiescence.⁹ In this case, Claimant was given written directions in April 2008 and again in June 2008 to improve her planning skills. In August, when Rolt realized that nothing had been planned for National Assisted Living Week, she decided that Claimant had not adequately planned for this important event. The decision to terminate was the result of a lack of planning that had been addressed previously and was known by Claimant to be an area she needed to improve.

CONCLUSION

The Court concludes that there is substantial evidence in the record to show that Employer had just cause to terminate Claimant. The decision of the Board denying Claimant's petition for unemployment benefits is *Affirmed*.

IT IS SO ORDERED.

Richard. F. Stokes

Original to Prothonotary

⁹*Bear-Glasgow Dental, L.L.C. v. Edwards*, 2007 WL 1651988, at *3 (Del. Super.).