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

CRYSTAL SMITH,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N12A-04-003 CLS
	)	
CHRISTIANA CARE HEALTH SERVICES and UNEMPLOYMENT INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	
	)	

Date Submitted: November 15, 2012
Date Decided: February 20, 2013

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

ORDER

Crystal Smith, *Pro Se*, Bear, Delaware. Appellant.

James H. McMackin, III, Esquire, Allyson Britton DiRocco, Esquire, Morris James, LLP, 500 Delaware Avenue, Ste. 500, P.O. Box 2306, Wilmington, Delaware 19899-2306. Attorneys for Appellee, Christiana Care Health Services.

Scott, J.

Introduction

Before this Court is the Appellant Crystal Smith's ("Appellant") appeal from the decision of the Unemployment Insurance Appeal Board ("Board"). The Court has reviewed the parties' submissions. For the reasons that follow, the decision of the Board is **AFFIRMED**.

Background

Appellant, Crystal Smith, was employed by Christiana Care Health Services ("Appellee") as a full time patient escort employee from February 12, 2007 through July 20, 2011. Appellant was terminated on July 20, 2011 for excessive lateness, idleness and inappropriate conduct. Appellee has an attendance policy that permits six absences and five occurrences of lateness in a 12 month period and a discipline policy that provides for progressive discipline; both policies were communicated to and acknowledged by Appellant throughout her employment.

Appellant received a reminder on April 11, 2011, after she was late six times in violation of the attendance policy, that stated that any future absences would bring her outside of the guidelines and may result in termination. This action was consistent with Appellee's discipline policy. Appellant was late three more times on July 3, 10 and 11th in violation of the attendance policy. Appellant claims that her tardiness on these days was due to her suffering from morning sickness brought on by her pregnancy. Appellant, however, did not provide Appellee with a

medical reason for her lateness, but instead stated that she was "moving slowly." Appellant was terminated on July 20, 2011 as a result of these violations.

Appellant filed a claim for unemployment benefits with the Delaware Department of Labor on July 24, 2012. The Claims Deputy determined, on August 10, 2011, that Appellant was terminated for just cause and would thus not be eligible to receive unemployment benefits. Appellant appealed the decision to the Appeals Referee and a hearing was held on October 10, 2011. At this hearing, Plaintiff claimed that her excessive lateness should have been covered under FMLA. Witnesses on behalf of Appellee stated that Appellant did not cite any medical excuse for her lateness and stated that she was late because she was "moving slowly." The Appeals Referee affirmed that Claims Deputy's denial of benefits, finding that just cause existed for Appellant's termination.

Appellant then appealed this decision to the Board and a hearing was held December 7, 2011. The Board affirmed the Referee's denial of unemployment benefits and found that Appellee met its burden of proving sufficient evidence to support a finding of just cause for Appellant's termination. Appellant subsequently filed this appeal.

Issues on Appeal

Appellant argues that Appellee terminated her for six instances of tardiness that were approved and covered under the Family Medical and Leave Act

("FMLA"). Appellee argues that Appellant was properly discharged for just cause in connection with her absences from work under 19 *Del C.* §3314. Moreover, Appellee argues that the Board's decision was supported by substantial evidence that Appellant was discharged in violation of Appellee's attendance policy.

Standard of Review

The scope of review of an appeal from the Board is limited to errors of law and whether the decision is supported by substantial evidence.[1] This standard requires more than a scintilla of evidence but less than a preponderance of evidence.[2] This Court will not weigh evidence, determine the credibility of the witnesses, or make its own factual findings and conclusions.[3]

Discussion

I. The Board Did Not Commit Legal Error in Affirming the Decision of the Appeals Referee Who Found Appellant was Terminated With Just Cause.

The Board did not commit legal error in affirming the decision of the Appeals Referee, who determined Appellant was terminated from his employment with just cause. Pursuant to 19 *Del. C.* § 3314(2), an individual is 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

[1] *Chester v. Adecco USA*, 2011 WL 1344740, at *2 (Del. Super. Ct. Apr. 6, 2011).
[2] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[3] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

> subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount.[4]

To terminate an employee for just cause requires notice that further behavior or performance may lead to termination.[5] An employer may terminate an employee for violating a reasonable company policy.[6] An employee must be made aware of the policy's existence.[7] A two-step analysis is used when determining just cause: "1) whether a policy existed, and if so, what conduct was prohibited and 2) whether the employee was apprised of the policy and if so, how was he made aware."[8] Knowledge of a company policy can occur through a written policy or where an employee was previously warned.[9]

The Board correctly applied the correct legal standard to the facts of this case. The Board reviewed the company's policy and Appellee indicated that she was aware of, and acknowledged, the policy throughout her employment. In their decision, the Board set forth the proper standard for just cause. The Board additionally noted that just cause exists where there is a "willful or wanton act or pattern of conduct despite warnings about chronic lateness and absences in violation of the employer's

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[4] 19 *Del. C.* § 3114(2).
[5] *Barton*, 2004 WL 1284203, at *1.
[6] *McCoy v. Occidental Chem., Corp.*, 1996 WL 111126, *3 (Del. Super. Ct. Feb. 7, 1996).
[7] *Id.*
[8] *Id.*
[9] *Id.*

attendance policy."[10] It was not an error of law for the Board to conclude based on the decision of the Referee and its own hearing that Appellant was terminated with just cause and not eligible to collect unemployment benefits under 19 *Del. C.* § 3314(2).

II. The Decision of the Board is Supported by Substantial Evidence.

The decision of the Board is supported by substantial evidence in the record. Evidence is substantial when a reasonable person would think the evidence presented was adequate to support the conclusion.[11] In determining whether substantial evidence exists to support the Board's decision, this Court must view the record in the light most favorable to the prevailing party.[12] A reasonable person would believe that the evidence set forth and relied on by the Board was adequate to support the Board's denial of benefits. Appellee acknowledged that she was aware of Appellant's attendance policy. She received a warning, pursuant to the established policy, indicating that if she was late again, action would be taken against her that may include termination. However, Appellant was late three additional times after this warning. Appellant claimed that her employer was aware of her intent to use FMLA to excuse her tardiness, however, at the time of each absence, she merely told her employer that she was "moving slowly" and did

[10] R. at 89.
[11] *Oceanport Ind. v. Wilmington Stevedores.*, 636 A.2d 892, 899 (Del. 1994).
[12] *Brommel v. Chrysler, LLC*, 2001 WL 4513086, at *3 (Del. Super. Ct. Oct. 28, 2010) (citing *E.I. DuPont De Nemours & Co. v. Fanpel*, 859 A.2d 1042, 1046-47 (Del. Super. Jan. 30, 2004).

not cite to a medical reason. Moreover, she did not find out that she was pregnant until after these three instances of tardiness. This substantial evidence supports a denial of unemployment benefits by the Board, a conclusion which a reasonable person reviewing the facts would deem adequate to support the Board's decision. For these reasons, the decision of the board is **AFFIRMED.**

Conclusion

Based on the forgoing, the decision of the Board is **AFFIRMED.**

IT IS SO ORDERED.

/S/CALVIN L. SCOTT
Judge Calvin L. Scott, Jr.