

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

LAURA M. PATTERSON,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N12A-08-015 CLS
	)	
RED CLAY CONSOLIDATED	)	
SCHOOL DISTRICT and	)	
UNEMPLOYMENT INSURANCE	)	
APPEAL BOARD,	)	
	)	
Appellees.	)	

Date Submitted: March 8, 2013

Date Decided: June 28, 2013

On Appeal from the Decision of the Unemployment Insurance Appeal Board.  
**REVERSED AND REMANDED.**

**ORDER**

Nicholas G. Kondraschow, Esq., Rhodunda & Williams, Wilmington, Delaware.  
Attorney for Appellant.

James J. Sullivan, Jr., Esq., Geoffrey G. Grivner, Esq., Buchanan Ingersoll, &  
Rooney PC, Wilmington, Delaware. Attorneys for Appellee Red Clay  
Consolidated School District.

Caroline Lee Cross, Esquire, Delaware Department of Justice, 820 North French  
Street, Wilmington, Delaware 19801. Attorney for Appellee, Unemployment  
Insurance Appeal Board.

**Scott, J.**

## **Introduction**

This case is an appeal from a decision of the Unemployment Insurance Appeal Board (“Board”) denying unemployment benefits to Appellant Laura Patterson (“Appellant”). The Court has reviewed the Board’s decision and the parties’ submissions and, for the following reasons, finds that the Board’s decision was not supported by substantial evidence. The decision of the Board is **REVERSED and REMANDED.**

## **Background**

Appellant began working for Red Clay Consolidated School District (“Employer”) as a full-time elementary school teacher on August 23, 2004. On November 14, 2011, Appellant was absent from work because she was sick. She was also involved in a domestic dispute which resulted in her ex-husband causing physical injury to her. In addition, her ex-husband took her cell phone and laptop, which rendered Appellant unable to follow Employer’s procedure in requesting a substitute for the next day; however, Appellant contacted her coworker who was able to secure a substitute for her.

Appellant’s son was a student at the school where she worked. On November 15<sup>th</sup>, Appellant went to the school to pick up her son. Appellant had visible injuries to her face. While she was there, Appellant was asked to attend a meeting which was to take place on November 16, 2011 with Angeline Willen, the

Director of Human Resources, Susan Carpenter, the Benefits and Leave specialist, and Appellant's union representative. Appellant was not disciplined for her absences, but based on concerns about Appellant's abuse, the Director of Human Resources told Appellant that she needed to contact Human Management Services, Inc. ("HMS"), a third-party service provider which provides professional evaluations for certain life problems that employees are facing.

Appellant did not believe that it was necessary to go to HMS, but she agreed to go so she could return to work. Employer placed Appellant on paid administrative leave. A letter addressed to Appellant from Employer and dated November 16, 2011 confirmed that an administrative referral was made to HMS and stated the following:

You must contact Nancy Shriner at HMS by 5:00 p.m. Friday, November 18, 2011.

You must give Nancy Shriner permission to release information to Angeline Willen.

Human Resources will call you with your return to work date.<sup>1</sup>

Appellant attended an Employee Assistance Program ("EAP") evaluation with Joseph Marroco from HMS, he recommended that Appellant visit PACE, a drug and alcohol abuse treatment center in Wilmington, Delaware. Appellant did

---

<sup>1</sup> Record, at 10.

not understand this referral since they had not discussed drug or alcohol abuse during the evaluation. Mr. Marrocco stated that Employer informed him that alcohol had been smelled on Appellant's breath. When Appellant asked Employer about this allegation, she was informed that, in September 2011, the former principal noticed the smell of alcohol on Appellant's breath when Appellant was picking up her son on a day that she was out sick.

Appellant's paid administrative leave expired and she was placed on unpaid Family Medical Leave Act ("FMLA") leave in December 2011. Appellant attended PACE three times until she suffered a medication-induced seizure on January 16, 2012. PACE required her to obtain a note from her neurologist before returning to the program. She was referred back to HMS for a re-evaluation. Mr. Marocco told Appellant to go to the MeadowWood facility in New Castle. However, Appellant requested and received permission to attend Rockford Center instead because it was closer to her home. Appellant was evaluated at Rockford, but not admitted because Rockford did not believe that Appellant required the level of treatment provided at Rockford. She was referred to places for counseling; but, Rockford would not sign the release that Mr. Marocco required for HMS since Appellant was not admitted.

On January 29, 2012, Appellant filed a claim for unemployment benefits and, due to Appellant's leave status, the Claims Deputy determined that Appellant was not "unemployed" and that, consequently, she was ineligible for benefits.

In a letter to Appellant dated February 1, 2012, Employer stated that the Hartford had denied short-term disability because of the "lack of attending physician information"; that Appellant's leave of absence had to be approved for short-term disability and that, without approval, the absence would be considered unauthorized leave; and that her FMLA leave would expire on March 26, 2012. The Employer also stated that a fitness-for-duty exam would be required before Appellant returned.<sup>2</sup>

On March 9, 2012, Appellant appealed the decision of the Claims Deputy. A hearing was held on April 27, 2012 wherein Appellant testified and Susan Carpenter testified on behalf of the employer. Ms. Carpenter stated that Appellant's leave was still pending because she had yet to comply with the requirements in the November 16<sup>th</sup> letter and that she did not know how long Appellant had to provide the information that Employer required.

The Appeals Referee ("Referee") reversed and modified the decision of the Claims Deputy and found that Appellant was unemployed, but she was still ineligible for benefits because she was discharged for just cause in connection with

---

<sup>2</sup> R., at 11.

her work. The Referee stated that Appellant's "short term disability has been pending since December 16, 2011 due to noncompliance."<sup>3</sup> The Referee referred to a letter from Employer to Appellant, dated March 22, 2012, wherein Employer advised Appellant that her FMLA leave was to expire and that she was "required to comply with the process outlined and set forth by the State of Delaware's employee assistance program, HMS Incorporated"<sup>4</sup> and stated that "[i]f [she] refuse[d] to comply with that process, [Employer] will have no choice but to proceed with termination of [] employment."<sup>5</sup> The Referee stated that, as of April 27, 2012, Appellant had not complied with the letter. The Referee determined that Appellant was on unpaid leave due to her noncompliance with the employee assistance program and that her refusal to meet the requirements constituted willful misconduct.

Appellant appealed the Referee's decision and challenged the characterization of her pending short term disability as being due to noncompliance. Appellant argued that she did not refuse and she described the steps that she had taken to comply. Appellant testified that had since been given the choice to go to one of three facilities, one of which was MeadowWood, but she chose to go to Mirmont instead.

---

<sup>3</sup> R., at 12.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

The Board determined that Appellant was unemployed. As to whether Appellant was discharged for just cause, the Board stated that

Claimant was instructed by Employer to cooperate with the employee assistance program, HMS and engage in the treatment recommended. Employer presented evidence to the Referee that Claimant was not in compliance with the directive from HMS as of November 16, 2011. At some point, Claimant was on [FMLA] leave, but she was notified that it was expiring on March 26, 2012. She was notified that HMS considered her actions to be non-compliance with their program. Employer has encouraged Claimant to apply for short-term disability, but Claimant has refused to do so because she does not think she is medically eligible for disability.<sup>6</sup>

Claimant testified before the Board that she has researched additional facilities in which she may complete her substance abuse counseling as required by HMS. She has not enrolled in any of those programs.<sup>7</sup>

Although Claimant provided the Board with significant testimony regarding her attempt to comply with HMS's directive, she provided no corroborating documentation from any of the facilities she claims to have visited. The board is not convinced that Claimant complied with HMS. The evidence before the Board is that Employer required Claimant to comply with its employee assistance program, HMS, and undergo a fitness-for-duty exam before she could return to work. She has not done so. She has been aware of this requirement since November, 2011.<sup>8</sup>

The Board determined that Appellant's failure to comply with the HMS employee assistance program constituted willful or wanton

---

<sup>6</sup> R. at 75.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

misconduct and that, “given the circumstances, Employer’s requirement was reasonable.”<sup>9</sup>

### **Standard of Review**

This Court’s review of a Board decision is limited to whether there was substantial evidence sufficient to support the findings.<sup>10</sup> Factual findings, “in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.”<sup>11</sup> “Questions of law, which arise in ascertaining if there was legal error, are subject to *de novo* review requiring the Court to determine whether the Board erred in formulating or applying legal precepts.”<sup>12</sup> Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>13</sup> Based on this limited review, this Court may not consider new evidence which was not presented before the Board<sup>14</sup> and if “the Court determines that additional evidence is needed to complete the record, it must remand the case to the agency for further proceedings.”<sup>15</sup> The Court may also

---

<sup>9</sup> *Id.*

<sup>10</sup> *Unemployment Ins. Appeal Bd. of Dep't of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

<sup>11</sup> 19 *Del.C.* § 3323.

<sup>12</sup> *Pinkney v. Delaware Dep't of Labor, Div. of Unemployment Ins.*, 2007 WL 172254, at \*2 (Del. Super. Jan. 23, 2007)(citing *Bermudez v. PTFE Compounds, Inc.*, 2006 WL 2382793, at \*3 (Del. Super. Aug. 16, 2006)).

<sup>13</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>14</sup> *Thompson v. UIAB*, 2011 WL 1225587 (Del. Super. Mar. 25, 2011); *Reid v. O'Connell Speedy Printing* 2000 WL 1211132 (Del. Super. July 3, 2000); *Congo v. News Journal Co.*, 1994 WL 465561 (Del. Super. July 15, 1994).

<sup>15</sup> *Deamond v. GPM Investments, LLC*, 2011 WL 532173, \* (Del. Super. Feb. 11,

remand the case where certain necessary evidence which could not have introduced at the time of a hearing is now available before the Court.<sup>16</sup>

### Discussion

To determine whether an individual is entitled to unemployment compensation, a two-part test must be performed.<sup>17</sup> First, the individual's eligibility, as provided for in 19 *Del. C.* § 3315, must be determined. Along with the requirements outlined in § 3315, an individual must be "unemployed" to be eligible to receive unemployment benefits.<sup>18</sup> If so, then it must be determined whether the individual is considered ineligible under the circumstances outlined in § 3314.

Under 19 *Del. C.* § 3314(2), an individual is ineligible to receive unemployment 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 [...]"<sup>19</sup> "Just cause" is defined as a wilful 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."<sup>20</sup> Where an employee violates a *reasonable* company rule that may serve as "just cause" for discharge only when it is

---

<sup>16</sup> *See Id.*

<sup>17</sup> *United Propane, Inc. v. Sowers-Vescovi*, 2000 WL 305504, at \*4 (Del. Super. Jan. 14, 2000).

<sup>18</sup> 19 *Del. C.* § 3302(17).

<sup>19</sup> § 3314 (Emphasis added).

<sup>20</sup> *Avon Products, Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986)(citing *Abex Corporation v. Todd*, Del.Super., 235 A.2d 271, 272 (1967)).

established that a policy actually existed, that the employee engaged in conduct not permitted by the policy, and that the employee was made aware of the policy.<sup>21</sup>

The record lacks substantial evidence to support the Board's finding that the Employer's requirement that Appellant comply with the HMS program or that Appellant comply with HMS's requirement that Appellant attend an alcohol abuse program was reasonable. The Board stated that "under the circumstances" the Employer's requirement was reasonable, even if Appellant disagreed that treatment was necessary. The employer presented no testimony or evidence about any sort of policy, rule, or requirement concerning its expectations for employees who are referred to the program. In its brief, Employer explains that its employees are expected to comply based on its policy; however, that policy was not presented to the Board and is will not be considered by the Court in this appeal. In addition, Appellant submitted an e-mail from February 4, 2013 from the Delaware Department of State Division of Professional Regulation informing her that Mr. Marocco's recommendation was being investigated because he was not licensed in Delaware. This was new evidence that could not have been presented to the Board at the time of the hearing.

The Board found that Appellant was effectively discharged, based on her unpaid leave status, for just cause in connection to her work. The Board did not

---

<sup>21</sup> *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at \*3 (Del. Super. Feb. 7, 1996).

adequately discuss at which point it considered Appellant to be “discharged” in relation to when and how Appellant’s conduct was willful and wanton and in “violation of the employer's interest, the employee's duties, or the employee's expected standard of conduct.” As to whether Appellant failed to comply with the employer’s requirement that she follow HMS’s directions and that she failed to comply with the HMS program, it is unclear from the record and the Board’s decision what exactly Appellant had to do in order to be in compliance with the HMS process and the Employer’s requirements. There was no evidence from Employer about the policy or the deadline by which Appellant had to comply. Therefore, the Board finding is not adequately supported by the record and this case must be remanded.

### **Conclusion**

For the reasons stated above, the decision of the Board is **REVERSED AND REMANDED** for further consideration and with instructions to the Board to state its conclusions with particularity.<sup>22</sup>

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

---

<sup>22</sup> See *Alfree v. Johnson Controls, Inc.*, 1996 WL 190015, at \*1 (Del. Super. Mar. 20, 1996).