SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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Date Submitted: May 30, 2003
Dated Decided: July 8, 2003

RE: ***George P. Hawthorne v. Linz Busing***
C.A. No. 03A-02-004-RFS

Dear Counsel:

This is my decision on George P. Hawthorne's ("Hawthorne") appeal of the Unemployment Insurance Appeal Board's ("Board") decision denying unemployment benefits to Employee. The Board's decision is affirmed for the following reasons.

STATEMENT OF FACTS

Hawthorne was employed as a school bus driver for Linz Busing ("Linz") from February 2000 until October 31, 2002. The owners of Linz, Mark and Lana Linz ("Owners"), testified that Hawthorne did a fine job in the morning but hurried too much in the afternoon. Consequently,

the Owners warned Hawthorne on a number of occasions to drive slower when taking children home.

In this regard, Hawthorne admitted that he had been warned several times to slow down.[1] On October 31, 2002, Hawthorne was driving a bus with twenty-four children on board when a motor vehicle collision took place. Hawthorne was traveling on Road 380 and attempted to cross Route 113 when the impact occurred. Route 113 is a major divided highway with two lanes of traffic in each direction.

Hawthorne testified that he stopped at the first stop sign and crossed lanes of traffic before stopping at the second stop sign located in the median. After crossing the other two lanes of oncoming traffic, the bus was struck in the front passenger side door on the shoulder of the road. Two children in the front of the bus testified that Hawthorne did not stop at the second stop sign. A child in the rear of the bus testified that Hawthorne rolled through the second stop sign. Hawthorne was cited by the police for failure to remain at the stop sign. Because of the accident, Linz terminated Hawthorne's employment.

On November 10, 2002, Hawthorne filed a claim for unemployment insurance benefits with the Delaware Department of Labor. The Claims Deputy denied benefits by decision dated November 22, 2002. Thereafter, Hawthorne appealed this determination. On December 24, 2002, the Appeals Referee reversed the decision of the Claims Deputy and found that Hawthorne was entitled to unemployment benefits. Thereafter, Linz appealed that decision. By opinion dated February 7, 2003, the Board reversed the decision of the Appeals Referee finding that

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[1]The appellant's opening brief denies that Hawthorne admitted being warned at page 5. Yet the transcript shows otherwise Tr. at 30-32, 82.

Hawthorne was ineligible for benefits because he was terminated for just cause. Hawthorne then filed this appeal.

ISSUE PRESENTED

Is the Board's finding that Hawthorne was terminated for just cause supported by substantial evidence and free from legal error?

DISCUSSION

A. Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence, *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960), and to review questions of law de novo, *In re Beattie*, 180 A.2d 741, 744 (Del. Super. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super.), *app. dism.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or find facts. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence adequately supports the agency's factual findings and is legally correct. 19 *Del. C.* § 3323(a).

B. Termination for Just Cause

While the Unemployment Compensation Act protects the unemployed from financial hardship and is liberally construed, an individual nonetheless cannot receive benefits if

terminated for just cause. 19 *Del. C.* § 3315(2); *Boughton v. Div. Of Unemployment Ins. of the Dep't of Labor*, 300 A.2d 25, 26 (Del. Super. 1972). 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. *Avon Products, Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986). The employee's expected standard of conduct is relevant to determining just cause for discharge. *Coleman v. Dep't of Labor*, 288 A.2d 285, 288 (Del. Super. 1972). The employer sets the standard for acceptable workplace performance. *Pinghera v. Creative Home Solutions, Inc.*, Del. Super., C. A. No. 02A-06-007, Del. Pesco, J. (Nov. 14, 2002) (ORDER). However, "not every act which violated the employer's interest or the employee's duties or expected standard of behavior is necessarily a wilful or wanton act." *Kingswood Cmty. Ctr. v. Chandler*, Del. Super., C.A. No. 98A-05-016, Barron, J. (Jan.19, 1999) (ORDER). Moreover, the employer must prove just cause for termination by a preponderance of the evidence. *Diamond State Port Auth. v. Morrow*, Del. Super., C.A. No. 00A-09-003, Del Pesco, J. (June 13, 2001) (Mem. Op.).

Wilful or wanton conduct exists where one is "conscious of his conduct or recklessly indifferent to its consequences." *Coleman v. Dep't of Labor*, 288 A.2d at 288. Wanton "means heedless, malicious or reckless, but does not require actual intent to cause harm, while 'wilful' implies actual, specific or evil intent." *Boughton*, 300 A.2d at 26. Inadvertence in isolated instances or good faith errors in judgment do not equate to just cause for termination. *Kingswood Cmty. Ctr., supra.*

Furthermore, "[i]t is undoubtedly true that 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. It is equally true that negligent behavior can rise to the level of misconduct. An instructive Pennsylvania Commonwealth Court case defines misconduct as *inter alia* '. . . negligence in such a degree as to show an intentional and substantial disregard of the employer's interests, or of the employee's duties and obligations to the employer.'" *Glass v. Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 93A-07-008, Ridgely, J. (Sep. 15, 1994) (ORDER) (citations omitted). In Delaware, negligence amounts to just cause when there have been "prior warnings about similar conduct, (the warnings requirement impliedly requires that other incidents of a similar nature have occurred);" and there is "no excuse, or justification, because of the type of work or the employee's abilities." *Kingswood and Glass* supra.

In this case, Hawthorne was terminated from his position as a school bus driver following a motor vehicle accident. Hawthorne was cited for failing to stop long enough at a well traveled intersection. As stated, Linz has the burden to establish that Hawthome was terminated for just cause. *Diamond State Port Auth.,* supra.

Here, substantial evidence shows that Hawthorne's conduct was not only negligent but also occurred despite warnings and was not excusable as expected by the job or the employee's ability. The record indicates that Hawthorne's conduct on the day of accident was negligent in failing to stop at the stop sign long enough before proceeding across the intersection. Under previously cited authority, negligent conduct supports a termination for just cause when the employee was previously warned about the subject matter.

In the present dispute, Hawthome was warned many times to slow down while driving his afternoon route. Moreover, Hawthorne conceded that he had been warned to slow down in the past, but he claimed to drive with the flow of traffic. Although Hawthorne's conduct was

negligent, the Board found that the Owners repeatedly warned Hawthorne not to speed and to take his time to avoid obviously life threatening situations.

Speeding on multiple occasions likewise reflects heedless or reckless disregard of the need to operate the bus in a controlled, unhurried and safe manner. Rolling through an intersection is a reoccurrence of behavior that Hawthorne had been previously warned against. There is a sufficient connection between speeding and rolling across oncoming traffic. Both reflect Hawthorne's inclination as an impatient or hurried school bus driver who is acting against the employer's interest. This behavior also presents a danger both to the public and the safety of the children on the bus. Under these circumstances, Hawthorne's negligent conduct supports a termination for just cause in the face of prior warnings against driving the school bus in a hasty manner.

CONCLUSION

Considering the foregoing, the Board's decision that Hawthorne was terminated for just cause is supported by substantial evidence, is free from legal error, and is affirmed.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

oc: Prothonotary
cc: Unemployment Insurance Appeal Board