

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

<b>DELAWARE TRANSIT</b>	)	
<b>CORPORATION</b>	)	CIVIL ACTION NUMBER
	)	
<b>v.</b>	)	02A-10-006-JOH
	)	
<b>BARBARA M. GROSS-TODD and</b>	)	
<b>UNEMPLOYMENT INSURANCE</b>	)	
<b>APPEAL BOARD</b>	)	

*Submitted: April 28, 2003*

*Decided: June 27, 2003*

***MEMORANDUM OPINION***

*Upon Appeal from a Decision of the Unemployment  
Insurance Appeal Board - **AFFIRMED***

Laura L. Gerard, Deputy Attorney General, Department of Justice,  
Wilmington, Delaware, attorney for appellant

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19720.

HERLIHY, Judge

The Delaware Transit Corporation ("DART") appeals the decision of the Unemployment Insurance Appeal Board that its employee bus driver Barbara Gross-Todd was terminated without just cause, thereby qualifying her for benefits. Gross-Todd explained to the Board that she had refused an assignment because she had felt ill and was unfit to work. She had told her immediate supervisor of her illness, but did not tell the regional supervisor. DART, on the other hand, presented witnesses who testified that Gross-Todd never mentioned any health concerns, but rather expressed to them that she did not take the assignment because it would interfere with another client's pick-up to which she was already assigned and had already agreed to perform. The Board found Gross-Todd to be credible and awarded her unemployment benefits.

On appeal, DART argues that 1) Gross-Todd had a legal duty to tell the regional manager of a legitimate reason for refusing work before going home, 2) the Board erred by failing to resolve discrepancies in Gross-Todd's testimony, and 3) no substantial evidence existed on the record upon which the Board could conclude that Gross-Todd was terminated without just cause. The Court finds all three arguments to be without merit and affirms the decision below.

***Facts***

Claimant Barbara Gross-Todd was employed as a full-time DART Paratransit bus driver. The incident in dispute occurred on May 24, 2002. At the time, she was employed under a last chance agreement, dated March 18, 2002. The agreement provided that Gross-Todd would be terminated for any occurrence of inappropriate behavior or insubordination during the next three years. Claimant was pregnant and was scheduled to begin maternity leave in June.

Upon completion of her shift at 1:30 p.m., Gross-Todd requested overtime work from a dispatcher, Troy Thomas. Thomas assigned her several passengers to pick-up at 3:00 p.m. in Newark. A few minutes later, another client became ready for pick-up at St. Francis Hospital. Marie Jones, Gross-Todd's service supervisor, told her that she had adequate time to perform the 2:00 p.m. pick-up<sup>1</sup> before the 3:00 p.m. pick-up to which she was already assigned.

The parties dispute Gross-Todd's reaction to the new assignment. Gross-Todd testified that she had been suffering, as a result of pregnancy, from intermittent back pain and cramps throughout the day, but that she

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<sup>1</sup> The exact time of the pick-up appears to be disputed. DART characterizes it as a 2:00 p.m. pick-up, while Gross-Todd refers to it as a 2:30 p.m. pick-up. The timing of the assignment is not important for the purposes of this review. For convenience's sake, the Court will refer to the assignment as the 2:00 p.m. pick-up.

felt well enough by the end of her shift to request overtime. However, the pain returned, she said, while she was awaiting the 3:00 p.m. assignment. According to Gross-Todd, she decided to go home, went to the dispatcher's window, and informed Jones that she could not complete the overtime assignments due to illness.

Thomas and Jones testified, however, that Gross-Todd did not mention any health concerns. Instead, they testified that she refused the 2:00 p.m. assignment because it would make her late for her 3:00 p.m. assignment. Jones allegedly replied that the 2:00 p.m. trip was nearby and would be brief.

The rest of the facts are undisputed. Jones told Gross-Todd to see Charles Moulds, the acting Chief Paratransit Supervisor for the Northern District of Delaware. Jones, thereafter, marked DART's log book to record Gross-Todd's departure from work and to note that Gross-Todd had refused to work. Jones also told Moulds that Gross-Todd had refused to work. When Gross-Todd met with Moulds, he asked her about the incident. Gross-Todd explained that she had already agreed to take the 3:00 p.m. pick-up, but then Jones wanted her to take the 2:00 p.m. pick-up. Gross-Todd told Moulds that she was concerned that if she took the 2:00 p.m. assignment, she would be late for the 3:00 p.m. pick-up. Gross-Todd

testified before the Board that she did not tell Moulds of her illness because he had been harassing her and she just wanted to go home. Moulds then told Gross-Todd that her actions constituted a refusal to work. Gross-Todd asked Moulds if such a refusal was a terminable offense, to which Moulds responded in the affirmative. Gross-Todd then left. At this point, it was approximately 2:30 p.m. Gross-Todd went to the hospital that night and was put on bed rest for the weekend.

On August 7, 2002, an Appeals Referee found that Gross-Todd's actions constituted insubordination, that she was terminated with just cause, and that therefore she was disqualified from receiving unemployment benefits. On appeal, the Board reversed the Referee's decision on September 11, 2002. The Board accepted as credible Gross-Todd's testimony that she was feeling ill on the day in question. Therefore, since leaving work due to illness cannot be considered willful or wanton misconduct, the Board found that she was discharged without just cause and that she is entitled to unemployment benefits.

DART has appealed that decision to this Court. DART makes three arguments. First, it argues that the Board erred as a matter of law when it found that Gross-Todd was discharged without just cause and was qualified to receive unemployment benefits. DART asserts that Gross-

Todd had a duty to inform Moulds, her supervisor with disciplinary authority, of her illness, but did not. The argument continues that because she failed to inform him, Moulds justifiably relied upon her silence in concluding that her refusal of work was not justified by a legitimate excuse. Under DART's policy, employees are not required to work while ill, but, obviously, that policy is premised upon an employee informing his or her supervisor of an illness.

Next, DART contends that the Board erred as a matter of law insofar as it failed to resolve certain conflicts in the evidence. DART maintains that there were several discrepancies in Gross-Todd's testimony and yet, without resolving them, the Board accepted her testimony. In particular, DART argues that the Board erred insofar as it failed to question her about why she had given two different reasons for having refused the second assignment; was it because she was sick or because it would have made her late for the 3:00 p.m. pick-up? A second such alleged discrepancy was Jones' reaction after Gross-Todd told her she was leaving work due to illness. Gross-Todd testified before the Referee that Jones said she would find someone else to do the pick-ups, but she testified before the Board that Jones continued to insist that she take the assignments. DART maintains that the Board's failure to resolve these discrepancies is grounds

for reversal.

Lastly, DART asserts that the Board's decision to grant unemployment benefits was not one supported by substantial evidence. DART contends that the issue of the case was whether Gross-Todd was insubordinate by refusing the assignment and leaving work without providing a legitimate excuse for her departure. Even if she had been ill, it argues, the Board ignored the fact that Gross-Todd was obligated and failed to inform Moulds, the supervisor whom DART claims was the first to have disciplinary power over her, of a justifiable reason for the refusal to work. DART also maintains that insufficient evidence existed to persuade any reasonable mind that Gross-Todd had a just cause to refuse the assignment.

### ***Standard of Review***

The duty of this Court on an appeal from the Board is to determine whether the Board's decision is supported by substantial evidence and free from legal error.<sup>2</sup> This Court does not sit as a trier of fact with authority to weigh the evidence, determine questions of credibility and make its own factual findings and conclusions.<sup>3</sup> The Board's decision must be affirmed

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<sup>2</sup> *Histed v. E.I. Du Pont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>3</sup> *Delaware Alcoholic Beverage Control Commission v. Newsome*, 690 A.2d 906, 910 (Del. 1996).

if it is supported by substantial evidence.<sup>4</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>5</sup> In reviewing the record for substantial evidence, the Court will consider the record in the light most favorable to the party prevailing below.<sup>6</sup>

### ***Discussion***

On appeal to this Court, the credibility of witnesses, the weight of their testimony and the factual inferences drawn therefrom are for the Board to determine.<sup>7</sup> This Court does not substitute its judgment for that of the Board.<sup>8</sup> Accordingly, this Court must view the record in the light most favorable to the party prevailing below, Gross-Todd.

When viewing the record of this case in a light most favorable to Gross-Todd, the essential facts are as follows. Gross-Todd accepted the 3:00 p.m. assignment because, at that time, she felt well enough to do so, but was thereafter assigned another, earlier pick-up. Gross-Todd felt the

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<sup>4</sup> *M.A. Harnett, Inc. v. Coleman*, 226 A.2d 910, 911-12 (Del. 1967).

<sup>5</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994).

<sup>6</sup> *General Motors Corp. v. Guy*, Del. Super., C.A. No. 90A-JL-5, Gebelein, J. (August 16, 1991) at 5.

<sup>7</sup> *Keeler v. Metal Masters Foodservice Equip. Co., Inc.*, 712 A.2d 1004, 1006 (Del. 1998).

<sup>8</sup> *Delaware Alcoholic Beverage Control Commission v. Alfred I. DuPont Sch. Dist.*, 385 A.2d 1123, 1125 (Del. 1978).



onset of pain and decided to go home rather than take the assignments and she told Marie Jones, her service supervisor, as such. The regional supervisor, Charles Moulds, asked Gross-Todd to see him before she left work and she obliged. Moulds confronted her about her refusal of the second assignment. Instead of informing Moulds that she no longer felt well enough to perform the pick-ups, Gross-Todd disagreed with Moulds over whether or not she had enough time to perform the 2:00 p.m. pick-up without being late for the 3:00 p.m. pick-up. When asked before the Board why she did not tell Moulds of her sickness, Gross-Todd stated:

First of all I was upset and irritated with the fact I had to be in there due to the fact that they had already told Marie Jones that I was sick and secondly that Charlie Moulds and his assistant had been harassing me.<sup>9</sup>

Moulds informed Gross-Todd that her conduct constituted a terminable offense and she went home, only to return several days later with doctors' notes evidencing her medical problems.

#### I.

DART's first argument on appeal is that the Board erred as a matter of law by failing to consider Gross-Todd's duty to speak so as to inform Moulds of her legitimate reason for refusing work. DART cites two cases

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<sup>9</sup> Tr. Bd. Hr'g. at 2.

for support. The first is *Laimé v. Casapulla's Sub Shop*.<sup>10</sup> There, the claimant had been off from work for a few days due to pregnancy complications when her husband called her employer to inform it that she would not be in as expected due to continued illness. The employer essentially told the husband that his wife should look for a new job. The claimant never spoke with her employer again, but rather assumed from what her husband told her that she had been terminated. The relevant part of the opinion states:

Further, Employee concedes that she did not attempt to contact Employer about her job. This Court agrees with the Board that, because Employee was not directly told by Employer that she was terminated, she had a duty to speak to Employer and clarify her job situation. "[A]n employee does have an obligation to inform an employer of resolvable problems, and to make a good faith effort to resolve them before simply leaving." In this case, Employee admits that Employer only communicated with Employee's husband. Employee made no effort to resolve her problems with Employer and never returned to work. The Board's finding that Employee voluntarily quit her job is supported by substantial evidence and free from legal error.<sup>11</sup>

The other case upon which DART relies is *Carroll v. Food Lion*.<sup>12</sup> In that case, the Court affirmed the Board's denial of review of the Appeal Referee's decision. The relevant portion of the Referee's reasoning was as follows:

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<sup>10</sup> Del. Super., No. 96A-11-006, Cooch, J. (May 20, 1997).

<sup>11</sup> Id. at 7 (quoting *Sandefur v. Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 92A-01-002, Goldstein, J. (August 27, 1993) at 10.).

<sup>12</sup> Del. Super., No. 94A-02-001, Lee, J. (Dec. 28, 1994).

This pattern of conduct was illustrative of the claimant's employment history with Food Lion. I find the claimant's testimony that she did not know she had to work on August 31, 1993 as lacking in credibility. She testified that a co-worker gave her her schedule and no mention was made of August 31<sup>st</sup>. The claimant had a duty to speak with management about her schedule or personally visit the store to receive it. She should not have relied upon a co-worker to convey that information to her.<sup>13</sup>

DART argues that the Board erred in the present case by failing to apply the legal principles used in *Laime* and *Carroll*. In *Laime* it was held that an employee has an obligation to inform an employer of resolvable problems and to make a good faith effort to resolve them before leaving. In *Carroll*, the Referee noted that the claimant had a duty to speak with management about her schedule and that she should not have relied upon a co-worker to convey that information. From this backdrop, DART argues that Gross-Todd had a legal duty to inform Moulds, not Jones, of her illness and to discuss with him options to resolve the situation. Furthermore, it is asserted that Gross-Todd erred by relying upon Jones to have notified Moulds of her illness. Accordingly, the argument continues, the Board cannot legally find that Gross-Todd was terminated without just cause.

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<sup>13</sup> Id. at 1 - 2.

The Court disagrees. Distilled to its essence, DART contends that Gross-Todd had a duty to inform a supervisor with disciplinary authority in order to leave work due to illness. According to DART, it was not enough for Gross-Todd to inform her immediate service supervisor, Marie Jones, of her medical condition, but rather she had a duty to go up the hierarchy of the organization to the Chief Paratransit Supervisor for the Northern District of Delaware, Charles Moulds. While the record does not flesh out the individual responsibilities of Jones and Moulds,<sup>14</sup> it appears safe to assume that Jones is responsible for making assignments to individual drivers and managing the day-to-day matters, while Moulds is responsible for more executive-type duties. It is unlikely that DART policy requires every driver to contact the Supervisor for the Northern District of Delaware whenever he or she calls in sick for work. DART asks too much of the Board and the Court to impose such a duty in this case, and fails to recognize the implications across the board that would flow therefrom.

While it would no doubt have been advisable for Gross-Todd to have told Moulds of her medical reasons for leaving work and not to have relied on Jones to inform him of such, DART has not presented this Court with

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<sup>14</sup> This fact is likely attributable to Gross-Todd's decision to represent herself in the proceedings.

precedent requiring such action in order to receive benefits. *Laine* is distinguishable from the case at hand because that case dealt with a claimant who heard of her termination second-hand, but never bothered to speak with her employer. Here, Gross-Todd was informed of her termination by the regional supervisor for DART. *Carroll* is equally inapplicable. There, the Appeals Referee rejected the claimant's testimony that she wasn't informed that she was to work on the day at issue, noting that the claimant had a duty to check her own schedule and not to rely on co-workers to relay the information accurately. Here, Gross-Todd was at work when she informed her direct, immediate supervisor, Marie Jones, that she was going home due to illness. In other words, she told her direct supervisor of her medical condition; she did not rely on a co-worker to relay information on her behalf.

## II.

DART's next argument on appeal is that the Board erred as a matter of law insofar as it failed to resolve certain conflicts in the evidence. Particularly, DART maintains that there were two discrepancies in Gross-Todd's testimony that the Board failed to adequately address. First, Gross-Todd testified that she told Jones that she was going home ill as the reason for refusing the 2:00 p.m. assignment. Gross-Todd also testified, however,

that she argued with Moulds about whether she would have had time to complete the 2:00 p.m. pick-up without being late to her 3:00 p.m. pick-up. DART argues that the Board failed to question Gross-Todd as to this discrepancy and therefore failed to resolve the conflict.

But the Board did address this discrepancy, albeit in a less preferable and indirect manner. The Board expressly found Gross-Todd's testimony of her illness credible. The fact that Gross-Todd discussed with Moulds the plausibility of handling both a 2:00 p.m. and a 3:00 p.m. pick-up is irrelevant, except insofar as it is useful to impeach her testimony that illness was to blame for her refusal to take the assignment. But once the Board accepted Gross-Todd's testimony that she was ill at the time in question -- testimony that was supported by proper professional documentation -- there was no need for the Board to delve deeply into the exact details of the conversation that took place in Mould's office.

The second discrepancy pointed to by DART involves Jones' reaction to Gross-Todd's refusal of the 2:00 p.m. assignment. Gross-Todd testified before the Appeals Referee that, after she told Jones she was going home ill, Jones said she was going to find someone else to do the 2:00 p.m. pick-up. In contrast, Gross-Todd testified before the Board that Jones continued to insist that she take the 2:00 p.m. trip. But the Court's reasoning for rejecting DART's first discrepancy argument is equally

applicable here. Whether Jones said that she would find a replacement driver or rather continued to insist on Gross-Todd taking the assignment is wholly irrelevant to the issue that was before the Board: was Gross-Todd terminated without just cause? In any event, as noted earlier, issues of witness credibility are to be resolved by the Board, not by this Court. This Court sees nothing in the record which warrants deviating from that principle.

### III.

DART's final argument is that the Board's decision was not based on substantial evidence in the record. The thrust of the argument is that, contrary to the Board's determination, the issue in this case was whether claimant was insubordinate by refusing the assignment without giving Moulds a legitimate reason. Accordingly, DART maintains, it was irrelevant whether Gross-Todd was ill the day in question.

This argument, however, is just a different formulation of DART's first argument on appeal. The premise of this substantial evidence claim is that Gross-Todd had a duty to inform Moulds, the regional manager, that she was ill and that informing Jones, her direct supervisor, provided insufficient notice to DART. The Court has already rejected that contention.

In short, the Board had ample evidence in the record before it to

conclude that Jones was ill and for that reason she declined the assignment. Gross-Todd, who was at that time approximately eight months pregnant, testified that she had intermittent pain throughout her shift, which returned in the afternoon. She further testified that once Jones assigned to her the 2:00 p.m. pick-up, she decided to go home ill and told Jones, her direct supervisor, as such. While DART may take issue with the Board's decision as to the credibility of Gross-Todd, that decision is one which is beyond the function of this Court on an appeal.

Accordingly, the Decision of the Unemployment Insurance Appeal Board is **AFFIRMED**.

**IT IS SO ORDERED.**

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J.