

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

May 10, 2011

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PNC Bank - Delaware  
Attention: Sherry Silva  
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**RE: Carolyn M. Tosti v. PNC Bank  
C.A. No. S10A-04-002-ESB  
Letter Opinion**

Date Submitted: February 11, 2011

Dear Counsel and Ms. Silva:

This is my decision on Carolyn M. Tosti's appeal of the Unemployment Insurance Appeal Board's denial of her claim for unemployment insurance benefits. Tosti worked as a part-time teller for PNC Bank for about 17 months. She had a difficult time doing her job properly and was on probation when PNC terminated her employment after she violated the bank's "dual control" security system by leaving the key and combination to the vault with a co-worker and leaving the bank. The Board denied Tosti's claim for unemployment benefits, finding that this and her repeated failure to verify the identity of her customers before cashing their checks constituted "just cause" for her termination. "Just cause" is defined as a "willful 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>1</sup> I have affirmed the Board's decision because Tosti's actions do constitute "just cause" for her termination.

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<sup>1</sup> *Krouse v. Cape Henlopen School Dist.*, 1997 WL 817846, at \*3 (Del. Super. Oct. 28, 1997).

## STATEMENT OF FACTS

Tosti has worked in the banking industry for 30 years. She worked as a part-time teller for PNC from April 3, 2008 to September 30, 2009. Despite Tosti's many years of experience, she had a difficult time doing her job properly, particularly during her last eight months at PNC. During this time she (1) repeatedly cashed customers' checks without verifying their identity because she was uncomfortable in asking her customers for their identification; (2) repeatedly had a difficult time reconciling the automated teller machine's records to the actual cash in the machine despite having received extra training; (3) missed a meeting; (4) left the drive-thru window sign "on" when it should have been "off;" (5) repeatedly cashed checks for the wrong amounts; (6) repeatedly cashed checks for more than \$1,000 without getting the required prior approval from her manager; (7) made inappropriate comments in front of a customer; and (8) cashed voided and stolen checks. PNC has a four-step disciplinary process, consisting of a verbal warning, written warning, probation and termination. PNC followed this process and put Tosti on probation on July 13, 2009. PNC also told Tosti she faced termination for any subsequent problems with her work.

Tosti's difficulties did not end with her being placed on probation. In early September a customer called the bank for an order of coins, but Tosti did not have the coins ready when the customer arrived. Then, the very next day, Tosti had a difficult time cashing a customer's check, causing the customer to wait for an extended period of time. The end for Tosti came after she again cashed a customer's check without verifying the customer's identity and violated PNC's dual control security system for the vault. On September 15, 2009, Tosti cashed a customer's check, but there was a zero balance in the customer's

account. Tosti told her manager that she knew the customer. However, it turned out that the customer was deceased. Tosti also told her manager that she verified the signature on the customer's check, but she later admitted that she did not see the person who presented the check physically sign the check. On September 18, 2009, a customer came in for a large amount of cash. Tosti and a co-worker went into the vault under a dual control system to retrieve the money. Under the dual control system one employee has the key to the vault and another employee has the combination to the vault. After retrieving the money, Tosti left the other employee with both the key and the combination, placing oversight under a single employee, which is against PNC's policy. Later in the day, Tosti asked the other employee if she had returned the key and the combination to their proper place. The other employee told Tosti that she had not. Despite this, Tosti left work without ensuring the return of the key and the combination to their proper place. PNC then terminated Tosti. She then filed a claim for unemployment insurance benefits.

The Claims Deputy, Appeals Referee and Board all found that PNC had just cause to terminate Tosti. The Claims Deputy found that Tosti's repeated failure to follow PNC's policy requiring a teller to verify a customer's identity before cashing the customer's check was just cause for her termination. The Appeals Referee found that Tosti's repeated failure to follow PNC's check cashing policy and dual control policy for access to the bank's vault were just cause for her termination. The Board found that Tosti was discharged for just cause, finding that PNC had a policy in place that stated "[e]mployees assigned a working key or combination must maintain the respective item under single control."<sup>2</sup> The Board

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<sup>2</sup> Internal Control Structure: Branch Security Assignments.

found that Tosti was aware of this policy and failed to follow it and that her behavior violated PNC's interests and security procedures and the terms of her probation. The Board also adopted the findings of fact and conclusions of law of the Appeals Referee. Tosti then filed an appeal with this Court.

### STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, this Court is limited to a determination of whether there is substantial evidence in the record sufficient to support the Board's findings, and that such findings are free from legal error.<sup>3</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>4</sup> The Board's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."<sup>5</sup> The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>6</sup> It merely determines if the evidence is legally adequate to support the Board's factual findings.<sup>7</sup> Absent an error of law, the Board's decision will not be disturbed

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<sup>3</sup> *Unemployment Ins. Appeals Board of the Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

<sup>4</sup> *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dismiss.*, 515 A.2d 397 (Del. 1986).

<sup>5</sup> *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. Super. 1950).

<sup>6</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

<sup>7</sup> 29 Del.C. § 10142(d).

where there is substantial evidence to support its conclusions.<sup>8</sup>

## DISCUSSION

Tosti argues that the Board erred when it found that her actions constituted willful and wanton misconduct justifying the denial of unemployment insurance benefits, reasoning that she was trying to do a good job at all times, but was just not able to do so. Employees discharged for just cause are disqualified from receiving unemployment insurance benefits.<sup>9</sup> Just cause is defined as a “willful or wanton act or pattern of conduct in violation of the employer’s interest, or the employee’s duties, or the employee’s expected standard of conduct.”<sup>10</sup> “Willful and wanton conduct is that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance: it is unnecessary that it be founded in bad motive or malice.”<sup>11</sup> The employer has the burden to show that the employee acted willfully or wantonly in non-compliance with the employer’s policy.<sup>12</sup> The employer must also show that the employee received notice of the policy and the possibility that the employee’s deviation may lead to termination.<sup>13</sup>

Violation of a reasonable company rule may constitute just cause for discharge if the

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<sup>8</sup> *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

<sup>9</sup> 19 *Del.C.* § 3314(2).

<sup>10</sup> *Krouse*, 1997 WL 817846, at \*3.

<sup>11</sup> *Barton v. Innolink Sys., Inc.*, 2004 WL 1284203, at \*1 (Del. Super. May 28, 2004).

<sup>12</sup> *Id.* at \*1.

<sup>13</sup> *Id.*

employee is aware of the rule and the possible subsequent termination.<sup>14</sup> A two-step analysis is used to evaluate 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 [s]he made aware.”<sup>15</sup> Knowledge of a company policy may be established by evidence of a written policy, such as an employer’s handbook.<sup>16</sup> Written policies are sufficient, though not necessary, to show that an employee was aware of the employer’s expectations.<sup>17</sup> A key question is whether the employer clearly communicated to the employee what was expected of him or her.<sup>18</sup>

To satisfy the just cause standard, courts require more than mere inadvertence on the part on the employee.<sup>19</sup> Moreover, courts will not uphold a denial of benefits if the employee’s unsatisfactory performance was the result of incapacity or inexperience.<sup>20</sup> However, the cases make clear that negligent performance can rise to the level of willful or wanton misconduct, particularly where “it occurs despite warnings and is not excusable as

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<sup>14</sup> *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at \*3 (Del. Super. Feb. 7, 1996).

<sup>15</sup> *Id.* See *Pavusa v. Tipton Trucking Co.*, 1993 WL 562196, at \*4 (Del. Super. Dec. 1, 1993).

<sup>16</sup> *McCoy*, 1996 WL 111126, at \*3.

<sup>17</sup> *Id.* at \*3 (“Knowledge of a company policy may be established where there is evidence of a written policy...”).

<sup>18</sup> See *Smoot v. Comcast Cablevision*, 2004 WL 2914287, at \*4 (Del. Super. Dec. 16, 2004).

<sup>19</sup> *Country Life Homes, Inc., v. Unemployment Ins. Appeal Bd.*, 2007 WL 1519520, at \*2 (Del. Super. May 8, 2007).

<sup>20</sup> See *Starkey v. Unemployment Ins. Appeal Bd.*, 340 A.2d 165, 167 (Del. Super. 1975).

an expected result of either the nature of the job or of the ability of the employee.”<sup>21</sup> Whether an employee’s mistakes continued despite warning of their impropriety, and whether the mistakes were excusable as an expected result of the job or of the employee’s ability, are important considerations in determining whether an employee’s careless errors fall within the “zone of conduct that is willful and wanton.”<sup>22</sup>

The Board’s decision is in accordance with the applicable law and based upon substantial evidence in the record. PNC repeatedly talked to Tosti about her substandard job performance and the consequences of not improving her job performance. PNC also talked to Tosti about its check cashing policy and dual control policy for access to the vault. PNC put the written check cashing guidelines at each teller station. These guidelines require a teller to verify a customer’s identity before cashing the customer’s check. This policy protects both PNC and its customers from fraud. PNC talked to Tosti many times about the check cashing guidelines. Tosti acknowledged that she was aware of these guidelines and voluntarily chose not to follow them because she felt uncomfortable in asking a customer for identification. PNC Bank also has guidelines for taking money out of the vault. Tosti, like every other teller in the bank, was aware of them. These guidelines required the tellers to maintain separate control over the key and combination to the vault. This policy also protected PNC from fraud. On September 15, 2009, while on probation, Tosti cashed a customer’s check without verifying the customer’s identification. As it turned out, the customer was deceased and there was no money in the customer’s account. On

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<sup>21</sup> *Glass v. Unemployment Ins. Appeal Bd.*, 1994 WL 555467, at \*2 (Del. Super. Sept. 15, 1994).

<sup>22</sup> *Fed. St. Fin. Serv. v. Davies*, 2000 WL 1211514, at \*3-\*4 (Del. Super. June 28, 2000).

September 18, 2009, while still on probation, Tosti did not follow PNC's dual control policy for taking money out of the vault. PNC fired Tosti because she had again violated its policies after being placed on probation. Tosti was aware of PNC's policies and, given that she was on probation, knew that she would be terminated if she violated them again. Tosti's repeated violations of PNC's policies are more than mere inadvertence on her part. The evidence in the record demonstrates that Tosti was repeatedly told to verify a customer's identity before cashing the customer's check. Tosti failed to follow this policy, which resulted in her cashing a check written on a deceased person's account that had a zero balance. The evidence in the record also demonstrates that Tosti was aware of PNC's dual control policy for taking money out of the vault. Tosti admitted that she failed to follow this policy because she was in a rush to get back to her other work. Tosti's actions were not the result of incapacity or inexperience, but were instead the willful and wanton neglect by her of PNC's policies that were well-known to her. PNC clearly had just cause to terminate Tosti and the Board's decision making the same finding is correct.

### **CONCLUSION**

The Unemployment Insurance Appeal Board's decision is **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

/S/ E. Scott Bradley

E. Scott Bradley

oc: Prothonotary's Office  
cc: Unemployment Insurance Appeal Board