

IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

PHILIP M. FINESTRAUSS, P.A.,        )))))        C.A. 01A-05-002-PLA))  
Employer Below-Appellant         )  
  )  
  )  
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  )  
  )  
LINDA L. PHILLIPS,                 )  
Employee Below-Appellee

and THE UNEMPLOYMENT  
INSURANCE APPEAL BOARD,  
Appellee.

Submitted: January 8, 2002  
Decided: March 8, 2002

UPON APPEAL FROM A DECISION OF THE  
UNEMPLOYMENT INSURANCE APPEAL BOARD  
**AFFIRMED.**

**ORDER**

This 8th day of March, 2002, upon review of the papers filed by the parties in this case and the record of the proceedings below, it appears that:

(1) Appellee and claimant below, Linda Phillips, worked for Appellant and employer below, Phillip Finestrauss, as a paralegal from February 1999 until December 15, 2000, when Phillips was terminated by

Finestrauss. Phillips filed a claim for unemployment compensation on December 17, 2000, with the Delaware Department of Labor, Division of Unemployment Insurance. On December 29, 2000, a Claims Deputy determined that Phillips was eligible for benefits.

(2) On January 5, 2001, Finestrauss appealed the decision of the Claims Deputy. A hearing was held on January 22, 2001, by an Appeals Referee. On January 11, 2001, the Appeals Referee issued her decision affirming the findings of the Claims Deputy.

(3) At the Appeals Referee Hearing, Finestrauss argued that Phillips engaged in extensive personal phone calls, attended to personal tasks on firm time, failed to meet deadlines, and falsified her time sheets to show that she worked more hours than she actually worked. In support of that argument, Finestrauss testified that he had provided Phillips with a verbal warning on September 26, 2000,<sup>1</sup> and a follow-up memo on October 4, 2000, addressing the issues of concern. Finestrauss also presented the testimony of another employee, Steven Bellak, who testified that he observed Phillips attend to personal letters and tasks and engage in the alleged extensive personal phone calls.

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<sup>1</sup> In Appellant's Reply Brief, Finestrauss attempts to provide details of this "verbal warning," while at the same time acknowledging that the "exact details of the verbal warning are not in the record below." Appellant's Reply at 5.

(4) The Appeals Referee determined that Phillips had been discharged from her work without just cause. In support of her decision, the Appeals Referee stated:

Given the fact that the employer and his wife had been friends with the claimant, Finestrauss' reluctance to speak to the claimant in terms of warning and termination was understandable. Still, in order for a willful act of misconduct to be found, a prior warning is ordinarily required; unless the conduct is of such a nature that no such warning is necessary, such as with blatant insubordination. Therefore, while the claimant was on notice that she was to put in forty hours of actual work time each week, and to attempt to curb her personal phone calls, she was never given an unequivocal warning that her job was in jeopardy. As to the time sheets, the claimant was under no obligation to submit them at all. The minor discrepancies found on them do not indicate a willful or wanton disregard for the employer's interest. For these reasons, the employer has failed to meet its burden of proving just cause, and the claimant is qualified for benefits.<sup>2</sup>

(5) Finestrauss thereupon appealed the decision of the Appeals Referee to the Unemployment Insurance Appeal Board. On March 7, 2001, the Board held a hearing to consider the merits of Finestrauss' appeal. At the Board hearing, Finestrauss presented additional testimony by Anthony Carrell, Phillips' daughter's teacher. Finestrauss alleged that Phillips indicated on her time sheets that she was at work when, in fact, she was really at a parent-teacher conference.

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<sup>2</sup> Referee's Decision at 5.

(6) On March 21, 2001<sup>3</sup>, the Board issued its written decision affirming the Appeal Referee's determination. The Board found that Phillips was discharged without just cause and therefore eligible for benefits. Regarding this additional testimony, the Board noted:

The Board writes a separate opinion only to comment on the testimony of Mr. Carrel. He stated that contrary to the claimant's prior testimony, he met with her in the afternoon and not in the morning. The claimant admitted that she may have been mistaken about the time of the meeting. The Board does not find that this fact creates a willful or wanton act or sufficiently destroys the claimant[']s credibility.<sup>4</sup>

(7) Finestrauss appealed the decision of the Board to this Court, pursuant to Del. C. Ann. tit. 19 § 3323 (1995), on the ground that the Board committed legal error when it concluded that Finestrauss acted without just cause in terminating Phillips. Specifically, Finestrauss alleges that the "record of the Referee Hearing is replete with testimonial evidence from Steven Ballak and Karen DeCrease [another employee] regarding outrageously long personal phone calls."<sup>5</sup> In addition, Finestrauss cites case law wherein falsification of time cards by an employee has been deemed to amount to "just cause" to deny unemployment benefits.<sup>6</sup>

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<sup>3</sup> A revised decision was issued by the Board on March 30, 2001, to correct an error.

<sup>4</sup> Appeal Board Decision at 2.

<sup>5</sup> Appellant's Opening Brief at 8.

<sup>6</sup> *Id.* at 9.

(8) Phillips responds that the Board’s decision is supported by substantial evidence in the record and that the Board was correct in finding that Phillips was discharged without just cause in connection with her work. Phillips argues that Finestrauss’ October 4, 2000 letter was “a summarization of topics discussed at an earlier meeting, rather than the ‘unequivocal warning’ that is required.”<sup>7</sup> In addition, Phillips states that “[t]he purpose of the time sheets was not for payment since she was not paid hourly, but rather to furnish the Employer [Finestrauss] with a record that she was working the forty hours per week that he had requested.”<sup>8</sup>

(9) The Delaware Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. On appeal from a decision of the Board, the Court is limited to determining whether substantial evidence in the record supports the Board’s findings, and that such findings are free from legal error.<sup>9</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;<sup>10</sup> it is more than a scintilla

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<sup>7</sup> Appellee’s Answering Brief at 3.

<sup>8</sup> *Id.* at 4.

<sup>9</sup> See *Employment Ins. Appeals Bd. Of the Dep’t of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975); *Longobardi v. Unemployment Ins. Appeals Bd.*, 287 A.2d 690, 692 (Del. Super. 1971), *aff’d*, 293 A.2d 295 (Del. 1972).

<sup>10</sup> *Oceanport Indus. V. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. disp.*, 515 A.2d 397 (Del. 1986).

but less than a preponderance of evidence.<sup>11</sup> The Court in its appellate review does not, however, weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>12</sup>

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<sup>11</sup> *DiFilippo v. Beck*, 567 F. Supp. 110 (D. Del. 1983).

<sup>12</sup> *Johnson v. Chrysler*, 213 A.2d 64, 66 (Del. 1965).

The Court merely determines if the evidence is legally adequate to support the agency's factual findings.<sup>13</sup> Furthermore, this Court will give deference to the expertise of administrative agencies and must affirm the decision of an agency even if the court might have, in the first instance, reached an opposite conclusion.<sup>14</sup> Thus, this Court must determine if there is sufficient evidence in the record to support the Board's decision that Phillips was not discharged for just cause and is entitled, therefore, to unemployment benefits under Del. C. Ann. tit. 19 § 3315(2).

(10) Title 19 *Del. C.* § 3315(2) provides in relevant part that an individual is disqualified from receiving unemployment benefits where the individual has been discharged for just cause in connection with his or her work. "Just cause" is defined as a "willful or wanton act in violation of either the employer's interest, or the employee's duties, or of the employer's expected standard of conduct."<sup>15</sup>

(11) The Board is free to accept and reject testimony, accept the credibility of witnesses and weigh evidence as it sees fit.<sup>16</sup> The Board agreed with the Referee's findings, and found that the testimony of

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<sup>13</sup> See DEL. C. ANN. tit. 29 § 10142(d) (1997).

<sup>14</sup> See *Id.*; *Petty v. University of Delaware*, 450 A.2d 392, 396 (Del. 1982); *Levitt v. Bowvier*, 287 A.2d 671 (Del. 1972).

<sup>15</sup> *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. 1967).

<sup>16</sup> See *Evans v. Tansley*, 540 A.2d 1088 (Del. 1988)(ORDER)(citing *Coleman v. Dept. of Labor*, 288 A.2d 285 (Del. Super. 1972)).

Employer's witnesses did not create a willful or wanton act or sufficiently destroy the claimant's credibility.<sup>17</sup> The Court is satisfied that the Board's decision entitling Phillips to unemployment compensation as allowed by the statute is supported by substantial evidence.

For all of the foregoing reasons, the decision of the Unemployment Insurance Appeal Board is hereby **AFFIRMED**.

**IT IS SO ORDERED.**

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Peggy L. Ableman, Judge

cc: Philip Finestrauss, Esquire  
Linda Phillips, Claimant  
UIAB  
Prothonotary

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<sup>17</sup> Board Hearing Trans. at 2.



Both the Appeals Referee and the Board considered testimony from the Appellant and \*\*\* in determining that Appellant should be . . . . Specifically, the Appeals referee held:

The Board affirmed this decision and further stated:

The Appeals Referee and the Board considered the testimony from the Appellant and \*\*\*. The Appeals Referee and the Board determined questions of credibility and made factual findings in arriving at their decision. This Court may not weigh the evidence or determine credibility. Therefore, the Court finds that the issues raised in this appeal are factual and that there is substantial evidence in the record to support the Board's decision.

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Employer argues that the Referee's decision and the Board's decision were not supported by substantial evidence. Further, employer argues that . . . .

After reading the transcripts of both hearings (?), this Court finds that there is substantial evidence to support the Board's decision.

When the Board affirms a referee's decision after taking additional evidence, the Court relies upon the referee's determinations for the findings of fact and conclusions of law.<sup>18</sup> Therefore, there is no error when the Board adopts the Referee's findings of fact and conclusions of law.

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<sup>18</sup> *Boughton v. Division of Unemployment Ins. Dept. of Labor*, 300 A.2d 25, 26 (Del. Super. 1972).