April 4, 2003

Ms. JoAnn Price
112 White Pine Drive
Millsboro, DE 19966

Mr. Mark Grabowski
Blue Plate Diner
329 Savannah Road
Lewes, DE 19958

Re: Joann Price v. Blue Plate Diner and Unemployment Insurance Appeal Board
C.A. No. 02A-10-002

Date Submitted: January 30, 2003

Dear Ms. Price and Mr. Grabowski:

This is my decision on JoAnn Price's ("Claimant") appeal of the Unemployment Insurance Appeal Board's ("Board") decision denying her claim for unemployment benefits. I affirm the Board's decision for the reasons stated herein.

FACTS

Claimant was employed by Blue Plate Diner ("Employer") as a full-time server for approximately one month until her discharge on June 26, 2002. Claimant's co-workers reported to Employer that Claimant had failed to ring in on the cash register the sale of two cups of coffee and had pocketed the sale's proceeds. Employer investigated the allegations and found that, in fact, the cash register tape showed no evidence of the sale. Subsequently, Claimant was terminated for stealing $2.50, the proceeds from the sale of two cups of coffee. Claimant then

filed a claim for unemployment compensation with the Delaware Department of Labor on June 30, 2002.

The claim deputy denied Claimant unemployment benefits after finding she was terminated for just cause. Claimant filed a timely appeal of the claim deputy's finding. Claimant and Employer attended the hearing held by the Referee. Claimant testified that she put the money in her pocket because Employer's policy mandated that servers hold sale proceeds in their individual "banks" until the end of their shifts. Defending her behavior, Claimant stated: "I was extremely busy and there [was] a possibility I didn't ring em [sic] in." Employer countered that the restaurant was always busy and Claimant "had to reach over the cash register in order to give the coffees to the . . . take out people." Claimant denied discussions with Employer concerning customer and co-worker complaints about her attitude and the register tape. The Referee concluded:

> the servers carry their cash with them during their shift. They ring in sales on the employer's system, but turn in the cash at the end of their shift. On June 26, 2002 the claimant sold two coffees, but did not enter the sale on the employer's system. The claimant was then discharged.

The Referee concluded that Claimant's act did not amount to willful or wanton misconduct but was "an error of forgetfulness." Thus, the Referee found that Employer had failed to show just cause for Claimant's termination and reversed the claim deputy's decision.

Employer appealed the Referee's decision to the Board. Claimant failed to appear at the

proceeding, but witnesses for Employer testified before the Board.[1] Employer's witnesses alleged that a week prior to the termination, customer and employee complaints prompted Employer to warn Claimant to improve her attitude or face termination. Contrary to Claimant's prior testimony, Employer alleged that Claimant had been confronted with the register tape. Employer stated that it does not tolerate theft in the workplace. The Board concluded:

> The Board accepts employer's witnesses' testimony as credible and finds that claimant's actions in not ringing up the sale did amount to wilful or wanton conduct. Employer obviously cannot prove claimant's mental state at the time she did this. However, the evidence was undisputed that claimant was right next to the register and had to reach across it in order to had [sic] the coffees to the customer. Her actions in taking payment and not ringing the sale up on the register demonstrate, at the very least, a reckless indifference to employer's interests . . . Misappropriation of merchandise or funds constitutes willful or wanton conduct and provides the employer with just cause for discharge pursuant to 19 Del. C. § 3315(2), and requires no prior warning . . . The Board finds that claimant's behavior rose to the level of willful or wanton conduct and provided the employer with just cause for claimant's discharge.

Thus, the Board overturned the Referee's decision and denied benefits to Claimant. Claimant filed this appeal.

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

[1]Employer's witnesses were Mark Grabowski and Jim Paslawski, co-owners of the Blue Plate Diner.

(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 Indus. v. Wilmington Stevedores, 636 A.2d 892, 899 (Del. 1994); Battista v. Chrysler Corp., 517 A.2d 295, 297 (Del.), app. dism., 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. Johnson v. Chrysler, 213 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 19 Del.C § 3323.

DISCUSSION

According to 19 Del. C. § 3315(2), a claimant is not eligible for benefits when he or she is terminated from employment for "just cause." "Just cause" has been defined by this Court as a "wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the employee's standard of conduct." Abex Corp. v. Todd, 235 A.2d 271, 272 (Del. Super. 1967); See also Weaver v. Employment Sec. Comm'n, 274 A.2d 446 (Del. Super. 1971). A wilful or wanton act requires the employee to be "conscious of his conduct or recklessly indifferent to its consequences." Coleman v. Department of Labor, 288 A.2d 285, 288 (Del. Super. 1972). Misconduct, a term generally synonymous with "just cause," does not denote "mere . . . inadvertance in isolated instances or good faith errors in judgment." Starkey v. Unemployment Ins. Appeal Bd., 340 A.2d 165, 166-67 (Del. Super. 1975), aff'd 364 A.2d 651 (Del. 1976). A finding that an employee's acts were inadvertent negates just cause. Abex Corp., 235 A.2d at 272. Thus,

> where evidence on the record exists from which a factfinder could

> infer that an employee's substandard performance is the result of a willful act in violation of the employer's interests rather than conduct which, at first glance, appears to be merely inadvertent or inefficient, a denial of benefits is most appropriate.

Starkey, 340 A.2d at 167 (discussing whether employee's poor performance was just cause for his dismissal); see also Trotman v. Bayhealth Med. Ctr., Inc., Del. Super., C.A. No. 00A-05-001, Ridgely, P.J. (Nov. 6, 2000). When an employee is terminated for misconduct, the burden of proof generally lies with the employer to establish "just cause" for the termination. Curry v. Unemployment Ins. Appeal Bd., Del. Super., C.A. No. 93A-09-002, Steele, V.C. (May 25, 1994), at 3. Theft from an employer is "disregardful of the standards of behavior which an employer rightfully expects from an employee [and] may be found to be willful misconduct." Harmon v. Unemployment Comp. Bd. of Review, 444 A.2d 806, 807 (Pa. Commw. Ct. 1982) (theft from employer wilful misconduct even if no specific rule against theft exists); cf. Weaver v. Employment Sec. Comm'n, 274 A.2d 446 (Del. Super. 1971) (an employee's expected standard of conduct relevant when determining whether the actions created just cause for dismissal). Thus, the first instance of theft can create just cause for termination. See Shaw v. Happy Harry Inc., Del. Super., C.A. No. 92A-10-013, Alford, J. (Oct. 27, 1993); Denardis v. Unemployment Comp. Bd. of Review, 463 A.2d 116 (Pa. Commw. Ct. 1983). No rule requires an employer to provide an employee with "a warning that termination is imminent in all situations." Federal St. Fin. Serv. v. Davies, Del. Super., C.A. No. 99A-09-003, Bradley, J. (June 28, 2000), at 4 (citing Coleman, 288 A.2d 285, and Potts Welding & Boiler Repair Co. v. Irvine, Del. Super., C.A. No. 87A-AU-3-1, Stiftel, J. (Feb. 29, 1988)).

Claimant's appeal alleges she was "[u]njustly [a]ccused of stealing." Thus, she contests

the Board's factual findings. This Court is limited to an examination of the record presented by the Board. Delgado v. Unemployment Ins. Appeal Bd., 295 A.2d 585, 587 (Del. Super. 1972); see also Henry v. Department of Labor, 293 A.2d 578 (Del. Super. 1972).[2] Issues of witness credibility, the weight given to witness testimony, and reasonable inferences made from witness testimony lie with the Board not the Court. Coleman, 288 A.2d at 287. The Court must uphold the Board's factual findings if they are supported by substantial evidence. Abex Corp., 235 A.2d at 272-73. The Board's decision implies that it did not believe that Claimant's failure to ring through the sale was an inadvertent mistake. Apparently, the Board found Employer's testimony regarding Claimant's proximity to the cash register at time of sale credible and case dispositive. It was reasonable for the Board to believe that Claimant's act was willful or wanton, not inadvertent, because she could not avoid the cash register as it was directly in front of her. Furthermore, the Board accepted Employer's witnesses' testimony that the restaurant was normally busy. Therefore, the Board could reasonably conclude that Claimant should not have been flustered by this situation. Ringing in sales is an integral part of a server's duty to his or her employer. The Board's finding that Claimant's behavior constituted a wilful or wanton act is supported by substantial evidence. The Court is satisfied that theft is just cause for termination and the Board's decision is proper as a matter of law.

CONCLUSION

For the reasons stated above, the decision of the Board is AFFIRMED.

IT IS SO ORDERED.

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[2]Claimant and Employer have engaged in a written dispute over the facts of this case in letters to the Court. The Court will not consider the factual allegations in these letters.

Very truly yours,

E. Scott Bradley

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cc: Prothonotary's Office
Unemployment Insurance Appeal Board