IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

E.I. DUPONT DE NEMOURS AND COMPANY, INC.	)	
Appellant,	)	
v.	)	C.A. # 03A-04-033-FSS
TIMOTHY J. DOWNES and Unemployment Insurance Appeal Board,	)	
Appellees.	)	

Submitted: September 16, 2003
Decided: December 29, 2003

ORDER

Upon Appeal from the Unemployment Insurance Appeal Board –
REMANDED for Clarification

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SILVERMAN, J.

This is an appeal by the DuPont Company from the Unemployment Insurance Appeal Board's decision reversing an appeals referee's denial of benefits to Timothy J. Downes. The Board decided that, although Claimant used profanity to disparage his supervisor and otherwise was disrespectful, he was not insubordinate. Furthermore, the Board concluded that despite DuPont's written policy prohibiting insubordination, Claimant did not receive a warning before being fired. The issues on appeal are whether the Board's decision is legally correct and based on substantial evidence. As discussed below, the court cannot decide this case because the basis for the decision on appeal is unclear.

I.

Claimant was employed by DuPont as a pantry service worker from December 17, 1999 until December 6, 2002. Before beginning work at DuPont, Claimant signed a statement acknowledging that he understood the company's "Acts of Serious Misconduct Policy." Among other things, the policy explains that "[e]mployees are expected to treat each other with respect" and that employees are responsible for their "personal comments, actions, or gestures toward other employees which could cause an adverse reaction. . . ."[1] It warns that improper conduct "can

[1] DuPont's Rules Governing Employee Conduct, pg. 1.

lead to disciplinary action as serious as immediate discharge."[2] The policy defines acts of serious misconduct. These include insubordination, threatening to do bodily harm to fellow employees and engaging in activity that could provoke fighting.[3]

The incident in question occurred on November 28, 2002. Claimant was working with his supervisor, Terry Mitchell, and two other employees, Ortis Alderman and Willie Thomas. Mitchell let another employee leave work early, and Claimant told Mitchell, "I guess now you'll be the one stepping up. . .to show us who our true role model is." Mitchell replied that Claimant should watch out for his own job, and Claimant responded that Mitchell was not "shit at [his] position." Mitchell told Claimant there was no need to cuss, and that Claimant did not "know what [he was] up against." Claimant then made a reference to the dock, an outside area where DuPont receives deliveries and employees smoke. All of that is admitted. DuPont contends that Claimant said, provocatively, "We can take it to the dock." Claimant testified that he merely suggested to his supervisor, Mitchell, that the supervisor should go to the dock to cool off. In either event, Mitchell reported the incident to his supervisor, who sent Claimant home. On December 6, 2002, DuPont fired Claimant.

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[2] Id.

[3] Id., pgs. 1-2.

Claimant applied for unemployment compensation on December 8, 2002. The claims deputy found Claimant ineligible for benefits, and Claimant appealed. On January 22, 2003, an appeals referee affirmed the denial of benefits. DuPont did not attend the hearing.

The appeals referee heard evidence, much of which is outlined above. In addition, Claimant testified to telling Mitchell, "Maybe you need to go out to the dock." The appeals referee based her decision on 19 *Del. C.* § 3315(2),[4] which explains when discharged employees are disqualified from receiving benefits, and the fact that Claimant's behavior amounted to insubordination. The appeals referee did not mention DuPont's employee's misconduct policy.

Claimant appealed to the Board, which held a hearing on March 12, 2003. The Board considered the evidence previously presented to the appeals referee, and heard testimony from both parties. Two of DuPont's witnesses testified that Claimant told Mitchell, "We can take it to the dock." The Board's holding, in pertinent part, states:

> The Board does not accept the testimony of the employer's witnesses and finds the [C]laimant's testimony to be credible. The Board concludes that the [C]laimant did not threaten the supervisor. Also, the Board finds that the [C]laimant's comments to the supervisor did not constitute

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[4] DEL. CODE ANN. tit. 19, § 3315(2) (1995).

> willful or wanton misconduct even if stated in front of the staff. The Board believes that there was a need for a final warning prior to discharge to have the [C]laimant's remarks be seen as just cause for discharge.[5]

Thus, on April 5, 2003, the Board reversed the appeals referee's decision and found Claimant eligible for benefits. DuPont then filed this appeal.

II.

The standard of review for a decision of the Unemployment Insurance Appeal Board is whether the Board's findings and conclusions are supported by substantial evidence and free from legal error.[6] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] The Board, not the reviewing court, shall weigh the credibility of witnesses and resolve conflicts in testimony.[8] The Board should hear "all evidence

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[5] Unemployment Insurance Appeal Board's decision, pg. 2.

[6] *Longobardi v. Unemployment Insurance Appeal Board*, 287 A.2d 690, 692 (Del. Super. Ct. 1971)(citing *Air Mod Corporation v. Newton*, 215 A.2d 434, 438 (Del. 1965)).

[7] *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 893, 899 (Del. 1994)(citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).

[8] *Starkey v. Unemployment Insurance Appeals Board*, 340 A.2d 165, 166 (Del. Super. Ct. 1975)(citations omitted).

which could conceivably throw light on the controversy. . . ."[9] "Exclusion of relevant, material, and competent evidence is grounds for reversal if the refusal is prejudicial."[10] If there is substantial evidence and no legal error, the Board's decision will be affirmed.[11]

III.

An individual is disqualified for benefits when "the individual was discharged from the individual's work for just cause in connection with the individual's work. . . ."[12] The term "just cause" refers to a "wilful or wanton act in violation of. . .the employee's expected standard of conduct."[13] Wilful or wanton conduct requires a showing that "one was conscious of his conduct or recklessly indifferent of its consequences. . .[but] [i]t need not necessarily connote bad motive.

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[9] *Ridings v. Unemployment Insurance Appeal Board*, 407 A.2d 238, 240 (Del. Super. Ct. 1979).

[10] *Id.* at 240 (citing McCormick on Evidence, 5th Ed., § 60 at pg. 263).

[11] *Ringer v. State Personnel Office*, 1995 WL 562127 (Del. Super.).

[12] 19 *Del.* C. § 3315(2).

[13] *Abex Corporation v. Todd*, 235 A.2d 271, 272 (Del. Super. Ct. 1967).

. .or malice."[14]

In *Hundley v. Riverside Hospital*,[15] an employee was terminated after she verbally assaulted her supervisor and failed to cooperate when a second supervisor attempted to calm the situation.[16] The employee thereafter used profanity toward the guard escorting her from the building.[17] *Hundley* held that wilful misconduct is when an employee uses obscenities with no justification.[18]

Similarly, in *Dozier v. Uncle Willie's Deli, A Division of Peninsula Oil Co., Inc.*,[19] an employee was fired because she uttered an obscenity after a customer placed an order.[20] The court reasoned that an unprovoked, isolated instance of profanity in conjunction with a disregard for standard procedure in the workplace is wilful misconduct.[21] Because a customer's ordering a salad is not justifiable

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[14] *Coleman v. Department of Labor*, 288 A.2d 285, 288 (Del. Super. Ct. 1972).

[15] 1993 WL 542026 (Del. Super.).

[16] *Id.* at *1.

[17] *Id.* at *3.

[18] *Id.* at *7.

[19] 1992 WL 423938 (Del. Super.).

[20] *Id.* at *1.

[21] *Id.* at *3 (citing *Krimmel v. Com., Unemployment Compensation*

(continued...)

provocation, the employee engaged in misconduct amounting to just cause for dismissal.[22] The court further noted that the employee admitted using profanity.[23]

Employers sometimes write policies detailing intolerable acts of misconduct, and they inform their employees about those policies. An "expected standard of conduct," like those outlined in company policies, is relevant to determining "just cause" for discharge.[24] An employer's policy can serve as a first and final warning to employees as to what the employer considers adequate grounds for discharge.[25] In summary, as a matter of law, in the presence of a written policy, consistently enforced, an employee who is insubordinate may be discharged for wilful misconduct and denied benefits, even for a first offense.

IV.

After reading the Board's decision carefully, the court is confused about the Board's precise holding and reasoning. The Board states that Claimant's

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[21](...continued)
Board, 442 A.2d 15 (Pa. Commw. Ct. 1982)).

[22] *Dozier*, 1992 WL 423938, at *3.

[23] *Id.*

[24] *Coleman*, 288 A.2d at 288 (citing *Abex Corporation v. Todd*, 235 A.2d 271 (Del. Super. Ct. 1967)).

[25] See *Cook v. RMK Mini Mart*, 1982 WL 533647, at *2 (Del. Super.).

testimony was credible and Claimant did not threaten his supervisor, nor did his conduct amount to wilful misconduct. That is enough to reject DuPont's firing Claimant based on threatening behavior. The holding, however, does not state whether Claimant's admitted conduct amounted to insubordination. The Board goes on to hold that a final warning was required before Claimant's discharge could be for just cause. While the Board enjoys autonomy in fact-finding, the court is not completely satisfied that the Board gave full weight to the facts it found. The Board's addressing a final warning makes no sense if Claimant did not sass his supervisor. If Claimant was not insubordinate or challenging, he could not be fired, with or without a warning.

It appears that this case turns on whether Claimant was insubordinate when he admittedly mocked his supervisor with profanity in front of others, and when Claimant told his supervisor to go outside and "cool off." If the Board decides that Claimant was insubordinate, it must then consider DuPont's policy and determine whether DuPont regularly enforces it. If DuPont enforces its policy against insubordination, Claimant's discharge could be upheld without further warning. Conversely, if the Board finds Claimant not to have been insubordinate, Claimant is entitled to benefits and the question of a "final warning" is beside the point. The court respects the Board's finding as a matter of fact that Claimant did not threaten

his supervisor. The Board, however, must address the alternative justification for Claimant's discharge, insubordination.

V.

For the foregoing reasons, the April 5, 2003 decision of the Unemployment Insurance Appeal Board awarding unemployment benefits is ***REMANDED*** for clarification as called for here. Either side is entitled to request a new hearing.[26]

IT IS SO ORDERED.

Judge

oc: Prothonotary (Civil Appeals Division)

[26] See *Hitchens v. Unemployment Insurance Appeal Board of State of Delaware*, 1987 WL 14872, at *1 (Del. Super.)(new hearing held upon claimant's request).