IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

GEORGE POWELL, Appellant	)	
v.	)	C.A. No.: 03A-03-002 PLA
NORTHEAST TREATMENT CENTERS, INC.,	)	
and	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD, Appellees.	)	

Submitted: September 16, 2003
Decided: December 17, 2003

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

ORDER

George Powell, Wilmington, Delaware, *Pro Se*, Appellant.

Bruce C. Heron, Esquire, Akin & Herron, P.A., Wilmington, Delaware, Attorney for NorthEast Treatment Centers, Inc., Appellee.

Stephani J. Ballard, Esquire, Deputy Attorney General for the State of Delaware, Wilmington, Delaware, Attorney for Unemployment Insurance Appeal Board, Appellee.

ABLEMAN, JUDGE

George Powell ("Appellant") has appealed from the decision of the Unemployment Insurance Appeal Board of the State of Delaware ("UIAB" or "Board") wherein the Board affirmed the decision of the Appeals Referee that Appellant had been discharged for just cause and, therefore, is disqualified from receiving unemployment benefits pursuant to 19 *Del. C*. § 3315(2). Upon review of the parties' submissions and the record below, the Court concludes that the Board's decision should be affirmed.

Statement of Facts

Appellant was employed by NorthEast Treatment Centers, Inc. ("NET" or "Employer") a/k/a Lower Kensington, from January 4, 2000 until September 16, 2002. NET is a section 501(c)(3) non-profit corporation that has been providing behavioral health and social services in Delaware and Pennsylvania for over 30 years. Effective September 17, 2002, Appellant was terminated from his position as a Child Care Counselor at NET's Iron Hill Residence Center located in Newark, Delaware. Specifically, NET's Iron Hill Residential Center provides a residential treatment program for youths recovering from substance abuse addiction.

The first incident culminating in Appellant's discharge from NET occurred on September 4, 2002, two weeks prior to his official termination date. At that time, he tapped a co-worker, Gennie Tolliver, on the buttocks. According to Appellant, "[I] accidentally tapped her, I meant to tap her on her back and it went

all the way down to her butt."[1] In her testimony to the Board, Ms. Toliver testified that Appellant "reached up under her and grabbed her behind."[2] She reported the incident to her immediate supervisor, Fred Cokney. Mr. Cokney testified that he had a conversation with the Appellant regarding the incident, at which time the Appellant "[a]dmitted that he smacked her on the butt and he claimed that it was more of like a football teammate kind of smack and not a sexual smack."[3] Mr. Cokney further testified that he told the Appellant that Ms. Toliver was offended by the touching, explained to Appellant the difference between talking and touching, and instructed him on the seriousness of the offense. Although Mr. Cokney did not provide the Appellant with a written or verbal warning that his job was in jeopardy, he did counsel the Appellant on the impropriety and gravity of his conduct. Appellant conceded, and Ms. Toliver testified to the fact, that Appellant subsequently apologized to Ms. Toliver, but that she still remained wary of him.[4]

On September 11, 2002, Appellant, Ms. Toliver, and several other employees were seated at the dinner table during a break period while the teenagers were upstairs having their "quiet time." According to Appellant's testimony, Ms. Toliver was holding on to his food and told him that he wasn't going to get any because he was too big. Appellant claims that, jokingly, he told

[1] Board Hearing Transcript, dated February 5, 2003, at 4-5 (hereinafter "Bd. Hr'g Tr. at ___.").
[2] Bd. Hr'g Tr. at 27.
[3] Bd. Hr'g Tr. at 15.
[4] Bd. Hr'g Tr. at 25.

Ms. Toliver to give him his food or he was going to go over and "tap her on the butt."[5] On the following day, September 12, 2002, Ms. Toliver reported the second incident to Mr. Cokney. Mr. Cokney subsequently discussed this episode with his direct supervisor, Mr. McFeeley, and Appellant was placed on suspension pending the outcome of further investigation. Appellant was not scheduled to return to work until Monday, September 16, 2002.

On September 16, 2002, Mr. Cokney spoke with Appellant and apprised him of Ms. Toliver's second allegation of sexual harassment. Appellant felt that he could not be around the teenagers knowing that his job was in jeopardy, so he requested the rest of the day off. On Tuesday, Appellant called into work and Mr. Cokney informed him that he was being investigated with a recommendation for termination. A week later, Mr. Cokney informed Appellant that NET had investigated the September 11, 2003 incident and that Appellant had been discharged, effective September 17, 2002.

Procedural Posture

Following his termination from NET, Appellant filed for unemployment compensation benefits on September 29, 2002. On October 11, 2002, the Claims Deputy of the Delaware Department of Labor, Division of Unemployment Insurance, made the determination that Appellant was disqualified from receipt of

[5] Bd. Hr'g Tr. at 6.

benefits. After examining the facts surrounding Appellant's discharge, the Claims Deputy concluded that NET had "just cause" [6] to discharge him, based on a determination that Appellant's actions rose to a level of wanton or wilful misconduct. The Claims Deputy emphasized that, when discharging an employee for just cause, the burden of proof rests on the employer and requires a showing that the employee was conscious of his conduct and recklessly indifferent to the consequences. The Claims Deputy found that NET had satisfied its burden of proof.

Appellant filed a timely appeal on October 21, 2002. A hearing before an Appeals Referee of the Delaware Department of Labor, Division of Unemployment Insurance, was conducted on December 11, 2002. The Appellant testified before the Appeals Referee. NET did not participate, nor did it have a representative present on its behalf. On January 7, 2003, the Appeals Referee issued its decision, affirming the decision of the Claims Deputy that Appellant was discharged for just cause and was disqualified from receipt of unemployment benefits. Incorporated in its findings of facts, the Appeals Referee elaborated on the Claims Deputy's findings, noting that:

[6] 19 *Del. C*. § 3315 provides, in part:
An individual shall be disqualified for benefits:
(2) For the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount. DEL. C. ANN. tit. 19 § 3315 (1995 & Supp. 2002).

> In a discharge case, the employer must show by a preponderance of the evidence that the claimant was discharged for just cause in connection with his work. Just cause exists where the claimant commits a wilful or wanton act or engages in a wilful or wanton pattern of conduct in violation of the employer's interest, his duty to the employer or his expected standard of conduct.
> The issue in this case is whether the claimant committed an act of wilful or wanton misconduct that provided the employer with just cause to discharge him …. *[F]or there to be a finding of wilful or wanton misconduct a prior unequivocal warning is required putting the employee on notice that a repetition of certain behavior will be grounds for dismissal*. There are some types of conduct, however, which by their very nature must necessarily constitute wilful or wanton misconduct. These include some instances of insubordination, theft, violence or threats of violence, and other activities where the employee acts with reckless disregard for the employer's interests. *The claimant, while not specifically warned after the first incident, was counseled and must have known that his behavior was not acceptable* . . . . [H]owever, two weeks later he referred to the previous incident in front of other staff as he "joked" with the co-worker. This activity could not be condoned by the employer . . . . [T]o joke about a previous allegation of sexual harassment in this manner was a reckless act that showed a wanton disregard for the interest of the employer and for the employment relationship.[7]

On January 14, 2003, pursuant to 19 *Del. C.* § 3318, Appellant filed a timely appeal from the Appeals Referee's decision to the Board. Appellant attended the Board hearing conducted on February 5, 2003, and presented Dara Boger and Orenda Poindexter, two witnesses on his behalf. Also present were Tim McFeeley, employer representative, Ms. Toliver and Mr. Cokney, employer witnesses.

[7] Referee's Decision, Appeal Docket No: 146225 (Del. Dep't of Labor Div. of Unemployment Ins. Jan. 7, 2003)(emphasis added).

The Board issued its decision on February 19, and its revised decision on March 5, both of which affirmed the decision of the Appeals Referee.[8] In its decision, the Board noted that it had considered the entire record and had adopted the findings of fact and conclusions of law enumerated by the Appeals Referee. Specifically, the Board found that Appellant's joking about the prior touching incident constituted wilful or wanton conduct, disqualifying him from receiving benefits.[9] Further, the Board accepted Ms. Toliver's testimony as more credible than that of Appellant, found that the Appellant engaged in the touching intentionally, and also that he wilfully or wantonly made the second remark.[10] The Board noted that, "[A]ppellant's conduct was clearly not the sort of conduct an employer should have to tolerate in the work place and was in violation of employer's policy."[11]

The Board's decision became final on March 15, 2003. Appellant filed a timely notice of appeal from the Board's decision to this Court on March 14, 2003. In the instant appeal, Appellant claims four grounds upon which the Board's decision should be reversed: 1) "third letter from Board reversing first decision";

[8] The Board affirmed the Appeals Referee's decision in its written decision mailed on February 19, 2003, but erroneously stated that benefits were awarded. The Board corrected its inadvertent error in its Revised Decision, issued March 5, 2003, in which it affirmed the Appeals Referee's decision and denied benefits.
[9] Decision of Appeal Board, Appeal Docket No: 146225 (Del. Dep't of Labor Div. of Unemployment Ins. Feb. 19, 2003).
[10] *Id*.
[11] *Id*.

2) "I was not a wanton act"; 3) "I was not given a warning"; and 4) "Gennie Toliver lied, she did not place her hand on the Bible."

Issues on Appeal

NET timely filed its answer brief and raises two issues on appeal. First, Net contends that Appellant's conduct on September 4 and on September 11, 2003, respectively, constituted "just cause" for his discharge from employment with NET. Second, having been properly discharged for "just cause," Appellant is not entitled to unemployment insurance benefits.

Standard of Review

The Delaware Supreme Court and this Court repeatedly have emphasized the limited appellate review of factual findings of an administrative agency.[12] The function of the reviewing Court is limited to determining whether substantial evidence supports the Board's decision regarding findings of fact and conclusions of law and is free from legal error.[13] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[14]

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[12] *Industrial Rentals, Inc. v. New Castle County Board of Adjustment*, 2000 WL 710087 (Del. Super. Ct.), *rev'd on other grounds*, 776 A.2d 528 (Del. 2001); *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1998).
[13] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002); *See also Soltz Management Co. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992); *Mellow v. Board of Adjustment*, 565 A.2d 947, 954 (Del. Super. Ct. 1988), *aff'd*, 567 A.2d 422 (Del. 1989); *Janaman v. New Castle County Board of Adjustment*, 364 A.2d 1241 (Del. Super. Ct. 1976), *aff'd*, 379 A.2d 1118 (Del. 1977); *M. A. Harnett, Inc. v. Coleman*, 226 A.2d 910 (Del. 1967); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors Corp. v. Freeman*, 164 A.2d 686, 688 (Del. 1960).
[14] *Streett v. State*, 669 A.2d 9, 11 (Del. 1995); *accord Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986), *app. dism.*, 515 A.2d 397 (Del. 1986); *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

Moreover, substantial evidence is that evidence from which an agency fairly and reasonably could reach the conclusion it did.[15] It is more than a scintilla but less than a preponderance.[16] When reviewing a decision on appeal from an agency, the Superior Court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[17] It is well established that it is the role of the Board, not this Court, to resolve conflicts in testimony and issues of credibility.[18] Whenever the factual issues are fairly debatable, it is the duty of the Board to formulate decisions about the weight and credibility of various evidence or testimony presented to the Board.[19] The Court's responsibility is merely to determine if the evidence is legally adequate to support the agency's factual findings.[20] If the agency or Board's decision is supported by *substantial evidence*, the Court must sustain the decision of the Board, even though it would have decided otherwise had it come before it in the first instance.[21]

In essence, the Court does not sit as trier of fact, nor should the Court replace its judgment for that of the Board.[22] Specifically, when considering

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[15] *Mellow v. Board of Adjustment*, 565 A.2d at 954 (citing *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980)).
[16] *Id*. at 954 (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)); *Downes v. State*, 1993 WL 102547, at *2 (Del.) (quoting *Breeding v. Contractors-One-Inc*., 549 A.2d 1102, 1104 (Del. Super. Ct. 1988)).
[17] *Johnson*, 213 A.2d at 66.
[18] *See Mooney v. Benson Management Co.*, 451 A.2d 839, 841 (Del. Super. Ct. 1982), *rev'd on other grounds*, 466 A.2d 1209 (Del. 1983).
[19] *Mettler v. Board of Adjustment*, 1991 WL 190488, at *2 (Del. Super. Ct.).
[20] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002).
[21] *Mellow*, 565 A.2d at 954 (citing *Kreshtool v. Delmarva Power & Light Co*., 310 A.2d 649, 653 (Del. Super. Ct. 1973)); *Searles v. Darling*, 83 A.2d 96, 99 (Del. 1951) (emphasis added to original).
[22] *Johnson*, 213 A.2d at 66.

questions of fact, due deference shall be given to the experience and specialized competence of an administrative board.[23] It is the exclusive function of an administrative board to evaluate the credibility of witnesses before it,[24] as evidenced by the weight and reasonable inferences to be drawn therefrom.[25] Thus, the Court determines if the evidence is legally adequate to support the agency's factual findings.[26] Application of this standard "[r]equires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did."[27] In this process, "[t]he Court will consider the record in the light most favorable to the prevailing party below."[28] Only where there is no satisfactory proof in support of the factual findings of the Board, may the Superior Court or the Supreme Court overturn it.[29]

Discussion

A cursory review of the issues raised by Appellant on appeal indicates that they are neither substantive, nor well grounded in the law. As such, these meritless claims are not appropriate issues to be raised on appeal. Nevertheless, in deference

[23] DEL. CODE ANN. tit. 29, § 10142(d) (1997 & Supp. 2002); *Histed v. E.I. duPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).
[24] *See, e.g.*, V*asquez v. Abex Corp.*, 1992 WL 397454, at *2 (Del.).
[25] *Coleman v. Dep't of Labor*, 288 A.2d 285, 287 (Del. Super. Ct. 1972); *Downes v. State*, 1993 WL 102547, at *2 (Del).
[26] *Id.*
[27] *National Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. Ct. 1980).
[28] *General Motors Corp. v. Guy*, 1991 WL 190491, at *3 (Del. Super. Ct.).
[29] *Johnson*, 213 A.2d at 64.

to the Appellant, the Court will address each issue under the penumbra of substantial evidence in support of the Board's "findings of fact" and "conclusions of law" which are to be "free from legal error."

Appellant's first issue raised on appeal questions the accuracy and credibility of the decision issued by the Board. As noted previously, the Board made an inadvertent error in the "Decision" subsection of its initial written decision, dated February 5, 2003, by affirming the Appeals Referee's decision but, mistakenly, awarding benefits to the Appellant. This was an obvious clerical error since the text and analysis of the entire body of the decision unequivocally indicates that the Board affirmed the Appeals Referee's decision, especially its findings of facts and conclusions of law. In so affirming, the Board is mandated by 19 *Del. C*. § 3315 (2) to deny unemployment benefits to Appellant.

Second, in both the Notice of Appeal and in his reply brief, Appellant maintains that his conduct on both occasions was neither reckless nor wanton. He claims that the initial incident merely consisted of his reaching out to touch Ms. Toliver's shoulder, but he missed or misjudged his reach, and touched her buttocks. This was all part of the normal hi-jinks and "joking around" that routinely occurred during the co-workers' dinner period and breaks. Examination of the record, including, but not limited to, Ms. Toliver's testimony and the testimony of his immediate supervisor, Mr. Cokney, controverts these facts.

Instead, the evidence reveals an entirely different picture of inappropriate touching, peppered with innuendos, and accompanied by prohibited sexual harassment and misconduct. Hence, as the Court shall further discuss herein, Appellant's second allegation is not supported by substantial evidence.

In his third ground for appeal, Appellant contends that he was not given a warning after the initial September 4, 2002 incident. Ostensibly, employees are entitled to some form of notice or warning that their performance is unacceptable before being discharged. This warning need not expressly state the ultimate consequences, but must give notice of the impropriety of the acts.[30] Further, in *Coleman v. Department of Labor*, the Court stated that, "[t]he absence of advanced warning concerning the *consequences* of given acts, as opposed to notice of their impropriety, does not preclude a discharge for wilful misconduct."[31]

In his testimony at the Board hearing, Appellant contradicted his contention that he was not supplied with notice or warning. He admitted that, at his meeting with Mr. Cokney, he was told there was to be no further "touching or anything like that."[32] Additionally, the record indicates that Mr. Cokney's supervisory notes of the September 5, 2002 meeting with the Appellant plainly state that Mr. Cokney

[30] *Fed. St. Fin. Serv. v. Davies*, 2000 WL 1211514, at *5 (Del. Super. Ct.) (citing *Ortiz v. Unemployment Ins. Appeal Bd*., 317 A.2d 100 (Del. 1974); *Moeller v. Wilmington Sav. Fund Soc*., 723 A.2d 1177 (Del. 1999); *Coleman v. Dep't of Labor*, 288 A.2d 285 (Del. Super. Ct. 1972)).
[31] *Coleman*, 288 A.2d at 288.
[32] Bd. Hr'g Tr. at 18.

informed the Appellant of the seriousness of the offense and clarified that, "that sort of behavior would not be tolerated." Mr. Cokney's notes also point out that Appellant "seemed to understand the serious nature of his action and stated that he would be sure not to make further verbal or physical gestures towards Ms. Toliver." Also, NET's employee policy handbook, which the record reflects Appellant acknowledged as having read and understood upon his initial hiring, clearly spells out that Appellant's conduct violated the Group II Work Rules. Violation of these Rules could result in termination without interim disciplinary measures. Accordingly, Appellant knew, or should have known, of these policies prohibiting such misconduct.

Appellant's last contention, predicated on his belief that Ms. Toliver was untruthful in her testimony -- because she did not place her hand on the Bible -- is totally without merit. The first page of the Board hearing transcript validates that all persons who would be testifying, including Ms. Toliver, placed their right hands on the Bible and swore to tell the truth.[33]

Turning to the substantive issues on appeal, the Court finds that Appellant's conduct on September 4 and on September 11, 2003, respectively, constituted "just cause" for his discharge from employment with NET. Delaware courts have repeatedly defined "just cause" as a "wilful or wanton act in violation of either the

[33] Bd. Hr'g Tr. at 1.

employer's interest, or of the employee's duties, or of the employee's expected standard of conduct."[34] As emphasized previously, wilful or wanton misconduct requires a showing that one was conscious of one's conduct and recklessly indifferent of its consequences.[35] In this context, while "wilful" has been deemed to imply actual, specific, or evil intent, "wanton" has come to denote heedless, malicious, or reckless conduct, but does not require actual intent to cause harm.[36]

The Claims Deputy, the Appeals Referee, and the Board all found that Appellant was discharged for "just cause." The Court also finds that the facts and testimony contained in the record support these determinations and provide the requisite substantial evidence to affirm the Board's decision. It is the Court's opinion that Appellant intentionally committed the first act of touching Ms. Toliver. When he was hired by NET, he signed a written acknowledgment of his receipt and understanding of the employee policy handbook, which explains, among other things, the employer's policy prohibiting sexual discrimination and harassment, and the nature of employee discipline resulting from prohibited conduct. Specifically, NET's employee policy handbook differentiates between Group I Violations (resulting in progressive disciplines) and Group II Violations (resulting in suspension or termination). Group II violations that result in

[34] *Avon Products, Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986); *Starkey v. Unemployment Ins. Appeal Bd.*, 340 A.2d 165, 167 (Del. Super. Ct. 1975); *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. Ct. 1967).
[35] *Coleman*, 288 A.2d at 288.
[36] *Boughton v. Div. of Unemployment Ins. Dep't of Labor*, 300 A.2d 25, 26 (Del. Super. Ct. 1972).

termination without interim disciplinary procedures include: 1) violating NET's sexual harassment policy; 2) verbally, physically, or sexually abusing an employee; and/or 3) instigating or participating in disorderly conduct, assault, or verbal or physical fighting. Armed with this knowledge and information, Appellant improperly touched Ms. Toliver in violation of his employer's policies.

The Court finds that his subsequent joking and verbal threat to touch Ms. Toliver's buttocks two weeks later constituted willful or wanton behavior, again in violation of his employer's polices. By his own admission, at the meeting with Mr. Cokney after the initial touching incident, Appellant was made cognizant of the impropriety of his act and was instructed on the severity of his conduct. Yet, two weeks later, he again chose to violate his employer's required standards of acceptable work place conduct. His verbal threat was tantamount to an overt act of sexual harassment and contained those qualities and/or characteristics of "specific intent" and "heedless or reckless conduct," inherent in the concepts of "willful" and "wanton" as delineated in Delaware's case law.

In assessing the evidence presented and formulating its decision, the Board considered both the factual evidence and the credibility of the witnesses, and performed its exclusive function of reconciling inconsistent testimony and determining the credibility of witnesses.[37] Upon reviewing the Board's decision on

[37] *Simmons v. Delaware State Hospital*, 660 A.2d 384, 388 (Del. 1995); *Breeding*, 549 A.2d at 1106.

appeal, this Court will not weigh the evidence, determine questions of credibility, or make its own factual findings. The Board accepted Ms. Toliver's testimony as more credible than the testimony of the Appellant. It is the duty of the Board, and not of this Court, to resolve conflicts in testimony and issues of credibility. In accordance with the Board's finding, the Court holds that the evidence is overwhelmingly convincing and legally adequate to support the Board's factual finding that Appellant was discharged for "just cause." Absent an abuse of discretion, a reviewing court may not disturb the Board's decision.[38] Since the record does not reflect that the Board abused its discretion in this matter, this Court will not disturb its findings.

Accordingly, this Court holds that the decision of the Unemployment Insurance Appeal Board, finding that Appellant was terminated for "just cause" and denying unemployment compensation benefits pursuant to 19 *Del. C*. § 3315(2), is based upon substantial evidence and free of legal error.

[38] *Id.*

Conclusion

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

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: George Powell
Bruce C. Heron, Esquire
Stephani J. Ballard, Esquire
Prothonotary