SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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

September 26, 2006

Michael A. Shade
32823 Captains Way
Millsboro, DE 19966

Wal-Mart Associates, Inc.
c/o Talx UCM Services, Inc.
Attention: Kathleen Jones
Claims Service Representative
P.O. Box 283
St. Louis, MO 63166

RE: Michael A. Shade v. Wal-Mart Associates, Inc.
C.A. 06A-03-003 ESB

Date Submitted: June 20, 2006

Dear Mr. Shade and Ms. Jones:

This is my decision on Michael A. Shade's ("Shade") appeal of the Unemployment Insurance Appeal Board's (the "UIAB") denial of his application for unemployment benefits. Shade worked as a sales associate for Wal-Mart Associates, Inc. ("Wal-Mart"). Wal-Mart terminated Shade after he screamed obscenities at an assistant store manager. Shade filed an application for unemployment benefits. The Claims Deputy, Appeals Referee and UIAB all concluded that Wal-Mart had "just cause" for terminating Shade. Shade then filed a timely appeal with this Court.

STATEMENT OF FACTS

Shade went to a Wal-Mart store about an hour before he was supposed to start work there to go shopping on November 4, 2005. Just as a customer was about to back into a parking spot, Shade pulled into it. The customer asked Shade to move, which he did. However, instead of parking

in the employee parking area, as required by Wal-Mart, Shade parked in front of the store. Thomas Ludwig, an assistant store manager, saw Shade do this. He went outside and told Shade to move his vehicle. Shade, with his tires squealing, moved to the employee parking area. Ludwig then walked over to Shade and asked him, "What the h _ _ _ is your problem?" Shade responded, "This is not Wal-Mart's f_ _ _ing parking lot!" Shade then clocked-in and went to work. He later demanded an apology from the assistant store manager. Wal-Mart terminated Shade that day.

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 UIAB, this Court is limited to a determination of whether there is substantial evidence in the record sufficient to support the UIAB's findings, and that such findings are free from legal error.[1] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2] The UIAB's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."[3] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[4] It merely determines if the evidence is

[1] *Employment Ins. Appeals Board of the Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975); *Longobardi v. Unemployment Ins. Appeal Board*, 287 A.2d 690, 692 (Del. Super. Ct. 1971), *aff'd* 293 A.2d 295 (Del. 1972).

[2] *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986).

[3] *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. 1950).

[4] *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66 (Del. 1965).

legally adequate to support the agency's factual findings.[5] Absent an error of law, the UIAB's decision will not be disturbed where there is substantial evidence to support its conclusions.[6]

DISCUSSION

The UIAB concluded that Wal-Mart had "just cause" to terminate Shade because of his behavior and use of obscenities. Shade argues that the UIAB's conclusion is incorrect because Wal-Mart could not, in his view, terminate him for how he behaves, or what he says, when he is off-duty. Shade also argues that his statements, although they are admittedly obscene, are protected by the First Amendment to the United States Constitution.

When an employer terminates an employee, the burden is on the employer to show the employee was terminated for "just cause."[7] "Just cause" is defined as a "wilful 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."[8] It is well-established that an employee's duty to abide by his employer's interests and rules continues while the employee is off-duty.[9] If the employee's conduct while he is off-duty leads to his discharge, then the employee may be ineligible for unemployment benefits if his misconduct was related to his work.[10] Disrespectful behavior toward management has

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[5] 29 *Del.C.* § 10142(d).

[6] *Dellachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. Ct. 1958).

[7] *Evans v. Tansley*, Del.Supr., No. 294, 1987, Horsey, J. (March 29, 1988)(Order) at 4-5.

[8] *Avon Products, Inc. V. Wilson*, 513 A.2d 1315, 1317 (Del.1986).

[9] *James McLoughlin, L.L.B, Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits*, 35 A.L.R. 4th 691 (originally published in 1985).

[10] *Id.*

been found by this Court to constitute "just cause" for termination. Similarly, shouting obscenities at work has been found by this Court to be willful misconduct.[11]

Shade's conduct was related to his work. Everything that Shade did and said took place on Wal-Mart's property[12] and involved Wal-Mart's employees and policies. As such, even though Shade was off-duty, his misconduct was related to his work. Shade's behavior certainly constituted "just cause" for his termination. Shade clearly violated Wal-Mart's interests, his duties and the expected standard of conduct for an employee. Shade, on two occasions, parked in the parking area reserved for Wal-Mart's customers and only moved after being told to do so. Then Shade, in an admitted fit of anger, drove with his tires squealing to the employee parking area. Once there, Shade screamed obscenities at an assistant store manager. These are clear and obvious violations of how an employee should conduct himself at his employer's place of business, whether on-duty or not, and certainly constituted "just cause" for Shade's termination.

Shade's freedom of speech argument is not applicable. The First Amendment guaranties run against the federal and state governments, not against private entities.[13] It is commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by the government, be it federal or state.[14] In order for Shade's freedom of speech rights to even be implicated, there has

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[11]*Dozier v. Uncle Willies Deli,* 1992 WL 423938 (Del.Super.); *Hayward v. Employment Sec. Commission*, 283 A.2d 485 (Del.Super.Ct. 1971); *See also Crawford v. Eastern Mail Transport, Inc.*, 1993 WL 485899 (Del.Super.).

[12]Wal-Mart leased the store premises. *Shade v. Wal-Mart,* UIAB Appeal Docket No. 734131 (Dec. 20, 2005) at 7.

[13]*Winkley v. Bristol-Myers Squibb Company*, 793 F. Supp. 738, 741 (1992).

[14]*See Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94 (1973).

to be some sort of governmental action that restricted his speech. There was no such action in this case. The action taken by Wal-Mart was that of a private entity, not a governmental entity.

CONCLUSION

The UIAB's decision is both in accordance with the applicable law and supported by substantial evidence in the record. The UIAB's decision is affirmed.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office
Unemployment Insurance Appeal Board