

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

ANNA B. MELHEM,	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N13A-07-008 CLS
	)	
DEPARTMENT OF JUSTICE and	)	
THE UNEMPLOYMENT	)	
INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	
	)	

Date Submitted: January 24, 2014  
Date Decided: April 24, 2014

On Appeal from the Decision of the Unemployment Insurance Appeal Board.  
**AFFIRMED.**

**ORDER**

Anna B. Melhem, Esq., Wilmington, Delaware, 19809. *Pro Se* Appellant.

Kevin R. Slattery, Esq., Department of Justice, Wilmington, Delaware 19801.  
Attorney for the Department of Justice.

James T. Wakley, Esq., Department of Justice, Wilmington, Delaware, 19801.  
Attorney for the Unemployment Insurance Appeal Board.

**Scott, J.**

## **Introduction**

Before the Court is Appellant Anna Melhem's ("Appellant") appeal from the decision of the Unemployment Insurance Appeal Board (the "Board") affirming the decision of the Appeals Referee and finding that Appellant was discharged for just cause in connection with her work. The Court has reviewed the parties' submissions and the record below. For the following reasons, the Board's decision is **AFFIRMED**.

## **Background**

Beginning in September 2007, Appellant was employed by the Delaware Department of Justice ("DOJ") as a casual/seasonal paralegal.<sup>1</sup> In January 2013, Appellant was terminated for sending an e-mail through the State e-mail system to a private attorney in a matter unrelated to her duties at the DOJ.<sup>2</sup> The private attorney, Christine Demsey ("Ms. Demsey"), is a Delaware attorney who was representing a party involved in a divorce. Appellant's friend was the other party involved in the divorce and Appellant served as a third-party between the divorcing spouses for the purpose of child visitation. Using her State e-mail account, Appellant e-mailed Ms. Demsey's client and requested that he provide her with certain documents.<sup>3</sup> The client contacted Ms. Demsey and forwarded

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<sup>1</sup> Appellant is a New York attorney.

<sup>2</sup> Appellant's last day of work was January 18, 2013.

<sup>3</sup> Record at 125.

Appellant's emails. As a result, Ms. Demsey sent an e-mail to Appellant instructing her not to contact her client.<sup>4</sup> Appellant responded that she would no longer contact Ms. Demsey's client on her friend's behalf, but that she "certainly will not be told who [she] can and cannot email independently of [her] friendship..."<sup>5</sup>

On January 17, 2013, Appellant sent the e-mail that triggered her termination. That day, while Appellant stayed home in order to care for her sick child, she received a reply from Ms. Demsey again directing Appellant not to contact her client and also stating that any other contact would be considered harassment.<sup>6</sup> Appellant responded by stating, "Don't threaten me Ms. Demsey, the Bar Association might not take kindly to it. It also might be interested to learn that you are standing in the way of a woman from getting paperwork necessary to obtain a job and enroll her child in kindergarten."<sup>7</sup> Ms. Demsey forwarded the e-mail to Kathleen Jennings, the State Prosecutor ("Ms. Jennings"), and Appellant was subsequently terminated.

Appellant filed a claim for unemployment benefits, but the Claims Deputy found that Appellant was discharged for just cause. On February 25, 2013,

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<sup>4</sup> *Id.* at 124.

<sup>5</sup> *Id.* at 140.

<sup>6</sup> *Id.* at 141.

<sup>7</sup> *Id.*

Appellant timely appealed the decision of the Claims Deputy and a hearing was held before the Appeals Referee on March 12, 2013. Brian Cross (“Mr. Cross”), a retired Wilmington Police Department detective, and Felice Kerr (“Ms. Kerr”), the attorney who represented Appellant’s friend, appeared as witnesses on behalf of Appellant. Diane Haase (“Ms. Haase”), the Human Resources Manager, appeared as a witness on behalf of the DOJ.

The DOJ submitted its own policy in addition to the State’s Acceptable Use Policy. Section 10.6 of the DOJ’s policy, entitled “Ethics in Public Service,” listed several ethical standards to which DOJ employees were expected to adhere, including “[r]espect[ing] the right and opinions of others” and “[a]void[ing] taking any action which may create an appearance of impropriety.”<sup>8</sup> Section 10.8 required attorneys to notify their Division Head in writing prior to accusing another attorney of or reporting unethical conduct.<sup>9</sup> Section 13.3 required all employees to read and acknowledge the Acceptable Use Policy. Section 13.3(a) governed the use of e-mail and provided that “[e]lectronic mail systems are to be used for official, authorized, and ethical activities which are in the best interest of the Department of Justice and the State of Delaware.” It also provided that

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<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.* at 8.

“[e]lectronic mail is not to be used for general personal use” and that the “basic standards for using email are common sense, common decency, and civility.”<sup>10</sup>

The Acceptable Use Policy states that users were to

never use State systems (such as the Intranet or Internet) to engage that are unlawful, violate State policies or in ways that would:

- Be disruptive, cause offense to others, or harm morale.
- Be considered harassing or discriminatory or create a hostile work environment.
- Result in State of Delaware’s liability, embarrassment or loss of reputation.<sup>11</sup>

The Acceptable Use Policy permitted limited incidental or occasional personal use of State systems, within certain guidelines, so long as the use did not “[v]iolate any of the standards contained in [the Policy] or any other State of Delaware policies.”<sup>12</sup> Appellant stated that she received the Acceptable Use Policy, not the other policy submitted by the DOJ.

Ms. Kerr testified that that in her 23 years of experience of practicing family law, she has communicated with other State employees about personal matters. She also testified that the e-mail at issue was not in violation of any court order. Mr. Cross testified that during his over twenty-year career as a detective for the Wilmington Police Department, he had contact with DOJ personnel through their

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<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.* at 14.

<sup>12</sup> *Id.* at 15.

State e-mail on personal matters and that none of the employees objected to being contacted at their work e-mail address in relation to those matters.

Ms. Haase testified that Appellant violated Sections 10.6 and 10.8 of the DOJ's policies. Ms. Haase stated that the e-mail incident was not the first time that Appellant engaged in similar conduct. Ms. Haase testified that once, when Appellant was expressing discontent with the fact that she was not receiving healthcare benefits, she became very aggressive and wrote an aggressive e-mail to the Chief of Staff. According to Ms. Haase, Appellant did not get along well with her coworkers and her supervisor, Martin O'Connor ("Mr. O'Connor"), requested assistance in speaking with her because her coworkers felt that she was aggressive toward them. Ms. Haase also described a lunchroom incident in which police officers and deputy attorney generals ("DAGs") were holding a meeting in the lunchroom. When Appellant was not permitted to warm up her lunch during the meeting, she expressed that she was being treated with disrespect. On August 31, 2013, Mr. O'Connor and Ms. Haase met with Appellant to address her behavior. Ms. Haase stated that Appellant was given a final and unequivocal warning that "any more instances of complaints would result in termination."<sup>13</sup> Despite these

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<sup>13</sup> *Id.* at 25.

issues, Ms. Haase acknowledged that the DOJ has always been pleased with Appellant's work.<sup>14</sup>

The Appeals Referee affirmed the decision of the Claims Deputy. In its "Summary of the Evidence," the Referee summarized the testimony of each witness, quoted the text of the January 17<sup>th</sup> e-mails between Ms. Demsey and a portion of the Acceptable Use Policy and described Sections 10.6 and 13.3(a) of the DOJ's policies.<sup>15</sup> The Referee's "Findings of Fact" included only the facts related to the lunchroom incident, the August 31, 2012 warning, and the e-mail at issue. After discussing the relationship between just-cause termination and unequivocal warnings, the Referee concluded that the Appellant's behavior in sending the e-mail "demonstrated a reckless disregard for the aforementioned unequivocal warning" that Appellant had received from Ms. Haase.<sup>16</sup> The Referee stated that Appellant "used the State e-mail system, during work hours, to send a personal message to a private attorney" and it found that the e-mail was "highly confrontational in nature and aggressive in tone." The Referee also stated that, "[a]s the claimant was given notice of the consequences regarding future inappropriate comments and still acted against the employer's interests...her

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<sup>14</sup> *Id.* at 55.

<sup>15</sup> *Id.* at 143-45.

<sup>16</sup> *Id.* at 146.

conduct was wanton.”<sup>17</sup> Therefore, the Referee found that Appellant was discharged from work for just cause in connection with her work.

Appellant appealed the decision to the Board and a hearing was held on June 19, 2013. Ms. Haase appeared again as a witness for the DOJ and Ms. Demsey and Ms. Jennings appeared as witnesses for Appellant. Ms. Demsey explained the circumstances which prompted her to instruct Appellant not to contact her client, including her client’s request and the fact that Appellant’s role as a third-party was limited to child visitation issues.

Ms. Jennings explained how she received the e-mails and that “in [her] opinion... and those [she] consulted with – the Department of Justice, [Appellant’s] threat to [Ms. Demsey] in a private matter to send her to disciplinary counsel was highly inappropriate.”<sup>18</sup> Ms. Jennings stated that Appellant’s “use of the State email system under these circumstances gave the stamp of the State Department of Justice to [Appellant’s] threat to an attorney to take her to the Office of Disciplinary Counsel in a private matter...”<sup>19</sup> Ms. Jennings also

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<sup>17</sup> *Id.* at 146.

<sup>18</sup> *Id.* at 179.

<sup>19</sup> *Id.* at 183.

discussed Section 10.8 of the DOJ's policy which requires DAGs to notify their Division Heads prior to accusing another attorney of unethical conduct.<sup>20</sup>

The Board summarized the additional testimony and found that the evidence was substantially the same as the evidence offered to the Referee. Without providing further specific findings, the Board affirmed and adopted the Appeals Referee's decision as its own.

### **Standard of Review**

When this Court considers an appeal of a decision by the Board, its review is limited to whether there was substantial evidence to support the Board's findings or whether there was an error of law.<sup>21</sup> "Under this standard of review, questions of credibility and conflicts in evidence are reserved for the resolution of the Board."<sup>22</sup> Where, as in this case, the Board adopted the Referee's decision as its own, the Court will also review the Referee's findings and conclusions of law.<sup>23</sup>

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<sup>20</sup> Appellant provided the Board with *Michael Christopher Designs v. Willey*, 2011 WL 235794 (Del. Super. Jun. 8, 2011).

<sup>21</sup> *Profl Ambulance Serv., Inc. v. Unemployment Ins. Appeal Bd.*, 1991 WL 68965, at \*1 (Del. Super. Apr. 25, 1991).

<sup>22</sup> *Id.*

<sup>23</sup> *See Boughton v. Div. of Unemployment Ins. of Dep't of Labor*, 300 A.2d 25, 26 (Del. Super. 1972).

## Discussion

The issue before the Court is whether the Board erred when it found that Appellant was discharged for just cause in connection with her work. An individual “discharged from the individual’s work for just cause in connection with the individual’s work” is not entitled to receive unemployment benefits.<sup>24</sup> The employer bears the burden of showing by a preponderance of the evidence that the individual was discharged for just cause.<sup>25</sup> “‘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.”<sup>26</sup> To determine whether an employee’s violation of a policy constitutes just cause, the Court considers 1) “whether a policy existed, and if so, what conduct was prohibited under the policy” and 2) “whether the employee was apprised of the policy and if so, how was he made aware.”<sup>27</sup> “Knowledge of a company policy can be established by preponderance of the evidence of a written policy, such as an employer’s handbook or by previous warning of objectionable conduct.”<sup>28</sup> Even an employee’s “conduct which takes place off the job site and after working hours”

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<sup>24</sup> 19 Del. C. § 3314(2).

<sup>25</sup> *Edmonds v. Kelly Servs.*, 2012 WL 4033377, at \*2, 53 A.3d 301 (Del. 2012)(TABLE).

<sup>26</sup> *Id.* (quoting *Avon Products, Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986)).

<sup>27</sup> *Tolson v. Central De Community Drug & Alcohol*, 2012 WL 3027369, at \*3 (Del. Super. Jul. 24, 2012).

<sup>28</sup> *Id.*

can constitute just cause ““if there is sufficient nexus between the off-site misconduct and job-performance.””<sup>29</sup>

Where an employer does not condone the employee’s wilful or wanton misconduct, “an unequivocal warning to the employee is not mandated.”<sup>30</sup> Conversely, “[i]f an employer tolerates wilful or wanton misconduct, however, the employer may not be justified in firing employees without first warning them that their conduct is no longer acceptable.”<sup>31</sup>

The Board’s decision that Appellant was discharged for just cause in connection with her work was supported by substantial evidence. While the Referee did include Sections 10.6 and 13.3(a) of the DOJ’s policy and a portion of the Acceptable Use Policy in its “Summary of the Evidence,” the Referee limited its conclusion to whether Appellant received an unequivocal warning that future inappropriate comments would result in termination and whether Appellant disregarded that warning when she sent the e-mail. The Board adopted the Referee’s finding that, on August 31, 2012, Ms. Haase warned Appellant about her inappropriate comments and that similar future behavior would result in termination. This finding was supported by Ms. Haase’s testimony describing the

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<sup>29</sup> *Freeman v. Burris Foods*, 2007 WL 949495 (Del. Super. Mar. 19, 2007)(quoting *Baynard v. Kent County Motor Sales Co., Inc.* 1988 WL 31972, at \*1 (Del. Super.), *aff’d*, 1988 WL 101220 (Del.)).

<sup>30</sup> *Duhr v. State, Dep’t of Labor, Unemployment Ins. Appeal Bd.*, 1988 WL 102980 (Del. Super. Sept. 28, 1988).

<sup>31</sup> *Moeller v. Wilmington Sav. Fund. Soc.*, 723 A.2d 1177, 1179 (Del. 1999).

lunchroom incident and the subsequent meeting held by Ms. Haase and Appellant's supervisor in which Appellant was given a final and unequivocal warning that "any more instances of complaints would result in termination."<sup>32</sup> As stated above, an employee's knowledge about a particular policy can be established through a written policy or through a previous warning. The Board also adopted the finding that, on January 17, 2013, "the claimant used the state e-mail system during work hours, to send a personal message to a private attorney."<sup>33</sup> The Referee stated that the e-mail was "highly confrontational and aggressive in tone" and that it showed a reckless disregard for the prior warning and was contrary to her employer's interests.<sup>34</sup> These findings were also substantially supported by the Record.

Appellant relies on *Michael Christopher Designs v. Willey*<sup>35</sup> to argue that the record lacks substantial evidence of a sufficient nexus between her out-of-work conduct and her job performance because her conduct concerned a private matter unrelated to her work at the DOJ. In *Willey*, two salon employees engaged in a heated argument through text messages at a time when neither employee was at work or scheduled to work.<sup>36</sup> One of the employees, the claimant, was terminated

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<sup>32</sup> Record at 25.

<sup>33</sup> *Id.* at 146.

<sup>34</sup> *Id.*

<sup>35</sup> *Willey*, 2011 WL 25357.

<sup>36</sup> *Id.* at \*1.

after the other employee forwarded the messages to management.<sup>37</sup> When the claimant sought unemployment benefits, the claims deputy and the appeals referee each found that the claimant was discharged for just cause; however, the referee did not address the issue of sufficient nexus. In reversing the referee’s decision, the Board “emphasized that this dispute was outside of the workplace, and that [the employer] had not presented enough evidence to show that the incident established an actual detrimental interest to its interest as an employer.”<sup>38</sup> This Court found that substantial evidence existed on the record to support the Board’s finding that there was an insufficient nexus between the out-of- workplace conduct because the two employees had resolved a previous argument on their own prior to the argument at issue, the argument took place outside of work, and “did not manifest itself within the workplace or effect job performance.”<sup>39</sup> The Court explained that to be sufficient, “[t]he nexus must actually be detrimental to the employer’s interest and not merely speculative.”<sup>40</sup>

One important fact in the *Wiley* case which differs from the facts here is that the offensive communications in *Wiley* were sent via the employee’s personal cell phone and not through an employer-related medium. Here, although Appellant was not at work, she used the State e-mail system, which she was permitted to use

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at \*2.

<sup>39</sup> *Id.* at \*4.

<sup>40</sup> *Id.*

due to her status as an employee of the DOJ, to send a threatening e-mail concerning reporting the attorney to the Office of Disciplinary Counsel to a private attorney during work hours. These facts were relied upon by the Referee and adopted by the Board. Therefore, there was sufficient evidence that Appellant's out-of-work conduct was sufficiently connected to her job performance.

Appellant asserts that the DOJ conceded that the fact that it was sent through the State e-mail system was not an issue. Based on its review of the record below, the Court does not agree that the State made such a broad concession. For example, when Ms. Jennings testified before the Board, she stated that Appellant's use of the email system for a private matter was not the issue; she stated, instead, that Appellant's "use of the State e-mail system under [the circumstances under which she used it] gave the stamp of the State Department of Justice to [Appellant's] threat to an attorney to take her to the Office of Disciplinary Counsel in a private matter."<sup>41</sup>

Appellant also argues that, while she may have been given a warning regarding her conduct toward coworkers, she was not given any warning concerning her conduct in private matters with someone who did not work for the DOJ. The DOJ submitted evidence which showed that the warning given after the incident in the lunchroom was not limited to coworkers, but instead constituted a

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<sup>41</sup> R. at 183.

general warning regarding Appellant's aggressive behavior and future complaints of such behavior.<sup>42</sup>

Appellant's final argument is that the DOJ policy governing conduct outside of the workplace is "vague and haphazardly enforced" and, thus, fails to provide guidance to its employees.<sup>43</sup> Appellant specifically challenges the standard concerning the appearance of impropriety and the requirement that a DOJ attorney obtain approval prior to reporting another attorney's unethical conduct. However, the Board's decision was based on the Referee's conclusions relating to the August 31, 2012 warning about Appellant's behavior and Appellant's wanton disregard of that warning. The Referee did not address those policies in those conclusions. Therefore, this argument is unpersuasive because the Court has found that substantial evidence existed that Appellant was discharged for just cause in connection with her work.

### **Conclusion**

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

**IT IS SO ORDERED.**

*/s/ Calvin L. Scott*  
**Judge Calvin L. Scott, Jr.**

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<sup>42</sup> R. at 24, 128.

<sup>43</sup> Opening Br., at 10.