

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
JUDGE

1 The Circle, Suite 2  
GEORGETOWN, DE 19947

May 7, 2014

Robert W. Pownall  
34959 Keelson St.  
Millsboro, DE 19966

**RE: *Robert W. Pownall v. Silver Five, LLC***  
**C.A. No. S13A-11-002-ESB**

Dear Mr. Pownall:

This is my decision on your appeal of the Unemployment Insurance Appeal Board's denial of your claim for unemployment benefits. You were employed by Silver Five, LLC, as a server in one of its restaurants. Silver Five received a complaint from a customer about an overcharge on her credit card bill. The customer informed your manager that she had purposely declined to leave you a tip because she was displeased with your service. However, she was still charged a tip. Silver Five conducted an investigation and determined that you had overcharged the customer's credit card to give yourself a tip. Silver Five then discharged you for violating its policy against theft.

You filed a claim for unemployment benefits. Silver Five opposed your claim.

The Claims Deputy, Appeals Referee, and the Board all found you ineligible for unemployment benefits, reasoning that you were terminated for just cause. You then filed an appeal of the Board's decision with this Court.

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

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<sup>1</sup> *Unemployment Ins. Appeals Board of the Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

<sup>2</sup> *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *app. dismiss.*, 515 A.2d 397 (Del. 1986).

<sup>3</sup> *Geegan v. Unemployment Compensation Commission*, 76 A.2d 116, 117 (Del. Super. 1950).

<sup>4</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

findings.<sup>5</sup> Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.<sup>6</sup>

## DISCUSSION

This Court's role in reviewing an appeal is to determine if the Board's decision is based upon substantial evidence and free from legal error. According to 19 *Del.C.* § 3314(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."<sup>7</sup> A wilful or wanton act requires the employee to be "conscious of [her] conduct or recklessly indifferent to its consequences."<sup>8</sup> An action of an employee showing dishonesty and untrustworthiness justifies a dismissal for just cause.<sup>9</sup> Further, "the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn

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<sup>5</sup> 29 *Del.C.* § 10142(d).

<sup>6</sup> *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

<sup>7</sup> *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967).

<sup>8</sup> *Coleman v. Department of Labor*, 288 A.2d 285, 288 (Del. Super. 1972).

<sup>9</sup> See *Barisa v. Charitable Research Foundation, Inc.*, 287 A.2d 679 (Del. Super. 1972).

therefrom are for the Board's determination."<sup>10</sup> Hearsay is admissible in administrative hearings.<sup>11</sup>

You argue that the Board's decision is wrong because (1) you did not put a tip on the customer's credit card receipt, and (2) you were not able to present your evidence to the Board. Unfortunately for you, the evidence supports the Board's decision and not your arguments.

Stephanie Murphy, your manager, and Rochele McLeod, a vice-president for Silver Five, testified at your hearing. Silver Five received a complaint from a customer that a tip had been added to her bill even though she did not leave a tip. Murphy investigated the matter. Murphy was able to locate the electronic record of the charge and the physical credit card ticket. Murphy confirmed that the bill was for \$22.75 and the tip area was left blank. However, a \$2.25 tip was added to the bill when it was processed. Murphy then confirmed that you were the server of record for the check. After concluding the investigation, Murphy wrote a report of the incident and sent it to McLeod. You were then terminated by Silver Five for violating the company's policy against theft. McLeod told the Board that Silver Five used a system of "server banking," which means that each individual server is responsible

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<sup>10</sup> *Behr v. Unemployment Insurance Appeal Board*, 1995 WL 109026, at \*2 (Del. Super. Feb. 7, 1995).

<sup>11</sup> *Jordan v. Town of Milton*, 2012 WL 5494667 (Del. Super. Oct. 31, 2012).

for all of his credit card bills and cash throughout the shift.

You told the Board that you did not add the tip onto the customer's credit card receipt and would never risk your job for a \$2.25 tip. However, you admitted it was possible you either added the tip on by mistake or that another employee did so. You also told the Board that you were aware of Silver Five's policy regarding theft.

The Board found that your actions constituted wilful and wanton misconduct in violation of a known company policy, thereby providing Silver Five with just cause for your termination. I agree. Given the nature of the "server banking" system and the fact that you were the server who waited on the customer and were responsible for her credit card processing, there is certainly enough evidence to support the Board's finding that you violated Silver Five's policy against theft by giving yourself a tip when the customer did not give you one. The Board's finding that you were terminated for just cause is based upon substantial evidence in the record and free from legal error. The Board simply did not accept your testimony. It found no credible explanation in the record for how the tip was entered into the computer and confirmed without your knowledge.

You also argue that you were not given an opportunity to present evidence to the Board. That is simply not the case. You testified both before the Appeals Referee and the Board. At the conclusion of your hearing before the Board, you and the

Board Chairman had the following exchange:

Chairman: Is there anything else you wish to tell us?

Pownall: I think that might be it about right now.

You even offered more testimony after this exchange. The record indicates that the Board was familiar with your case. It had all of the evidence and the testimony that was offered before the Appeals Referee. You were given a chance to provide the Board with additional information relevant to your case, which you did. Your allegation that the Board refused to hear you out is without merit.

### **CONCLUSION**

The Unemployment Insurance Appeal Board's decision is **AFFIRMED**.

**IT IS SO ORDERED.**

Very truly yours,

*/s/ E. Scott Bradley*

E. Scott Bradley

cc: Silver Five, LLC