

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

1 The Circle, Suite 2
GEORGETOWN, DE 19947

May 8, 2013

Ronald R. Parker
101 Sussex Avenue
Bridgeville, DE 19933

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***RE: Ronald R. Parker v. Megee Plumbing and Heating and
Unemployment Insurance Appeal Board
C.A. No. S12A-10-008 ESB***

Date Submitted: April 16, 2013

Dear Mr. Parker and Counsel:

This is my decision on Ronald R. Parker's appeal of the Unemployment Insurance Appeal Board's denial of his claim for unemployment benefits. Parker was employed as a full-time technician for Megee Plumbing and Heating for nearly five years. He was paid on a flat rate system for the jobs he completed. The incident that lead to Parker's termination began when he responded to a service call for a customer on November 29, 2011. Parker performed some duct work for the customer without documenting the work or charging for it. However, he did accept \$100 from the customer. Parker characterized the \$100 as a tip and not payment for the work he had done. Megee did not learn of the situation until several months later when the

customer called for additional service and told Megee what had happened earlier.

After an investigation, MeGee determined that by accepting the \$100, not charging for the work performed, and not documenting the work, Parker's conduct amounted to moonlighting, falsifying company records, and theft of company time and materials. Parker admitted to performing the work on the duct and performing the work on company time. Parker also admitted to using company materials. Parker also admitted that the customer gave him \$100, although he characterized it as a tip and not for the work he had done. Megee terminated Parker on April 5, 2012. He then filed a claim for unemployment benefits.

The Claims Deputy, Appeals Referee, and Board all found Parker disqualified from the receipt of unemployment benefits, reasoning that MeGee had just cause to terminate Parker because of his willful violation of company policy. Parker now appeals the Board's decision to this Court, arguing that the Board's decision is based upon hearsay because the customer did not testify at any of his hearings.

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.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The Board’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 legally adequate to support the agency's factual findings.⁵ Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.⁶

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

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

² *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. disp.*, 515 A.2d 397 (Del. 1986).

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

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

⁵ 29 *Del.C.* § 10142(d).

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

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."⁷ A wilful or wanton act requires the employee to be "conscious of [her] conduct or recklessly indifferent to its consequences."⁸ An action of an employee showing dishonesty and untrustworthiness justifies a dismissal for just cause.⁹ Further, "the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn therefrom are for the Board's determination."¹⁰ Hearsay is admissible in administrative hearings.¹¹

Parker argues that the Board's decision is discriminatory and based solely on hearsay. Parker testified that he went to the customer's house to perform routine maintenance on the customer's HVAC system. After he arrived at the customer's house, Parker testified that he saw that the duct work was sagging so he reinforced it with duct tape. Parker argues that the value of the duct tape he used to fix the duct work was approximately twenty or thirty cents. For fixing the duct work, Parker testified that the customer tipped him \$100. Megee argues that hearsay testimony is

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

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

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

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

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

admissible in administrative hearings. However, it was not hearsay testimony that led to the Board's decision, but Parker's own admissions. Megee notes that Parker admitted to fixing the duct work on company time, receiving \$100 from the customer, not reporting the receipt of the \$100 to Megee, and using company materials to fix the sagging duct work.

The Board is allowed to accept hearsay testimony.¹² It is also the duty of the Board to determine the credibility of the witnesses before it.¹³ As long as the Board's decision is based upon substantial evidence, this Court will not overturn it.¹⁴ The Board's decision is based upon much more than hearsay. The uncontradicted evidence before the Board, much of which comes from Parker's own testimony, demonstrates that Parker was on a service call on company time, that he used company materials to fix the customer's duct work, that he did not document the work on a company work ticket, that he received a check for \$100 from the customer, and that he did not disclose the existence of this check to Megee until he was questioned about it later. Without any testimony from the customer, this is enough evidence to

¹² *Id.*

¹³ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

¹⁴ *Dallachiesa v. General Motors Corp.*, 140 A.2d 137 (Del. Super. 1958).

demonstrate “just cause” for Parker’s termination.¹⁵ Parker performed work for a customer with Megee’s materials and on Megee’s time without crediting that work to Megee. This is a willful and wanton act that goes against Megee’s interest. In addition to the above stated evidence, the Board also did not believe Parker’s testimony that the \$100 was a tip. It is well within the Board’s role as fact finder to determine the credibility of witnesses. The Board was satisfied, and so is this Court, that Megee met its burden of establishing that Parker was engaged in willful and wanton misconduct contrary to Megee’s interest by performing work on company time with company materials and not documenting it. The Board’s decision is based upon substantial evidence in the record and is free from legal error.

CONCLUSION

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

IT IS SO ORDERED.

Very truly yours,

/s/ E. Scott Bradley

E. Scott Bradley

¹⁵ I note that MeGee’s employee manual provides that an employee may be terminated for “moonlighting,” which is the type of activity that Parker was engaged in, albeit on company time. I note further that Parker had received a copy of the employee manual. Thus, Parker was on notice that he could be terminated from his job for moonlighting.