SUPERIOR COURT OF THE STATE OF DELAWARE

RICHARD F. STOKES

JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 TELEPHONE (302) 856-5264

June 18, 2013

Joshua J. Clifton 138 West Blake Drive Milton, DE 19968 Eugene M. Lawson, Jr., Esquire The Lawson Firm, LLC 402 Rehoboth Avenue Rehoboth Beach, DE 19971

RE: Clifton v. Atlantis Industries Corporation and Unemployment Ins.

App. Bd.

C.A. No. S12A-12-004 RFS Submitted: May 22, 2013

Dear Mr. Clifton and Mr. Lawson:

I have received Claimant Joshua Clifton's appeal of a decision of the Unemployment Insurance Appeal Board ("Board"). The Board's decision is reversed and the case is remanded to the Board for a re-hearing.

The following facts are of record. Claimant worked full-time as a third-shift operator for Atlantis Industries Corporation ("Atlantis") from April 2012 until July 26, 2012, the date of his discharge. On May 17, 2012, Claimant received a final warning notice about unexcused absences from work. The final warning was also the first warning.

On June 25, 2012, Claimant called in to say he would not come to work that day because his grandmother was dying and he did not know when he would return. Claimant assumed that the Atlantis bereavement policy would excuse him for the death of a grandparent.

He was informed by phone that he was terminated for unexcused absences. Claimant filed a petition with the Department of Labor, Division of Unemployment for unemployment benefits. His petition was denied by a claims deputy, and Claimant appealed.

Following a hearing, the appeals referee found that Claimant had failed his duty by not ascertaining whether Atlantis allowed bereavement time for grandparents. The appeals referee's conclusion was that Claimant's absence July 25, 2012 was wilful and wanton misconduct in conflict with the final warning notice. Thus, Claimant was disqualified from receiving unemployment benefits. On appeal, the Board held a hearing and affirmed the appeals referee. Claimant filed a timely appeal with this Court.

Standard of review. The Court's role in reviewing a decision of an administrative agency is to determine whether the agency's factual findings are supported by substantial evidence and whether the decision is free from legal error. Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion.²

Just cause. In a discharge case, the employer must show that the claimant was terminated for just cause. 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." Just cause includes notice to an employee in the form of a final warning that further poor behavior or performance may lead to termination.

Here, Atlantis had a three-page "Attendance Policy." Claimant did not raise this issue before the appeals referee, but he outlined it in his notice of appeal to the Board. When Claimant tried to testify about the attendance policy before the Board, he was interrupted. Claimant provided the Board with a copy of the attendance policy with his exhibits, but the Board did not address the question of whether Atlantis followed its policy.

¹*Histid v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340 (Del.1993).

²Olney v. Cooch, 425 A.2d 610, 614 (Del.1990).

³Avon Products, Inc. v. Wilson, 513 A.2d 1315 (Del.1986).

On these facts, a finding as to whether Atlantis conformed to its attendance policy must be made at the administrative level.⁴ This Court in its appellate role does not make findings of facts, without which the case cannot proceed.

The decision of the Board is **REVERSED** and the case is remanded for a rehearing on the limited question of whether Atlantis followed its policy in its termination of Claimant.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Original to Prothonotary

⁴See, e.g., Thornton v. Unemployment Insurance Appeal Bd., 1996 WL 658816 (Del.Super.)(reversing agency decision because employee handbook did not adequately inform employee of absentee policy).