SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

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

May 26, 2011

Bryan K. Irvin
P.O. Box 851
Selbyville DE 19975

Mountaire Farms of Delmarva
Attn: Roland Palmer
P.O. Box 710
Selbyville DE 19975

RE: Bryan K. Irvin v. Mountaire Farms of Delmarva
C.A. No. S10A-08-003 ESB
Letter Opinion

Date Submitted: April 15, 2011

Dear Messrs. Irvin and Palmer:

This is my decision on Bryan K. Irvin's appeal of the Unemployment Insurance Appeal Board's denial of his claim for unemployment insurance benefits. Irvin worked as a full-time quality assurance technician for Mountaire Farms of Delmarva earning $10.75 per hour. He worked for Mountaire from October 10, 2008 until he was terminated for excessive absenteeism on February 2, 2010. Irvin then filed a claim for unemployment insurance benefits. The Board denied Irvin's claim for unemployment insurance benefits, finding that his repeated absences constituted just cause for his termination. "Just cause" is defined as a "willful or wanton act or pattern of conduct in violation of the employer's interests, or of the employee's duties, or of the employee's expected standard of conduct."[1] I have affirmed the Board's decision because Irvin's excessive absenteeism does

[1] Krouse v. Cape Henlopen School Dist., 1997 WL 817846, at *3 (Del. Super. Oct. 28, 1997).

constitute "just cause" for his termination.

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.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The Board's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."[4] The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.[5] It merely determines if the evidence is legally adequate to support the Board's factual findings.[6] Absent an error of law, the Board's decision will not be disturbed where there is substantial evidence to support its conclusions.[7]

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

[3] *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. dism.*, 515 A.2d 397 (Del. 1986).

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

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

[6] 29 *Del.C.* § 10142(d).

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

STATEMENT OF FACTS

Irvin worked as a full-time quality assurance technician for Mountaire from October 10, 2008 to February 2, 2010. In the twelve months leading up to Irvin's termination, he was absent from work 20 times. While most of the absences were due to illness, two of the absences were not and the final absence for which he was terminated was also not due to illness. Mountaire has an attendance policy which provides that six attendance occurrences are grounds for termination. The policy also provides that two unexcused absences in a twelve month period are grounds for termination. Irvin received and signed the employee handbook on October 9, 2008. Irvin received a one-day suspension and final attendance warning for reaching his fifth occurrence on December 2, 2009. He was also warned that his next occurrence would result in his termination. Irvin was absent from work on January 29, 2010 due to a transportation problem and failed to clock-in on February 2, 2010, giving him 6.5 occurrences. Mountaire then terminated Irvin.

DISCUSSION

Irvin argues that he should not have been terminated because he had documentation for most of his absences. Mountaire's attendance policy states that an absence from work will be regarded as one occurrence, and the only absences that will not count as an occurrence are those related to a leave of absence approved by the Human Resources Department (i.e. funeral leave, jury duty, family and medical leave, or personal leave). If an employee is absent for two or more consecutive days, each day will be considered a separate occurrence unless Mountaire is supplied with an authorized medical certification stating that the employee can not work. If the employee provides the

certification, then the absence will be treated as only one occurrence. An employee can reduce the total number of occurrences if the employee goes 30 days with perfect attendance. This would reduce the occurrence count by .5. If the employee goes another 30 days with perfect attendance, then the total occurrence count will be reduced by another .5. If an employee reaches six occurrences, then the employee is terminated. All of the employees are provided with this information in the employee handbook.

The violation of a reasonable company rule may constitute just cause for discharge if the employee is aware of the rule and the possible subsequent termination.[8] A two-step analysis is used to evaluate just cause: "1) whether a policy existed, and if so, what conduct was prohibited, and 2) whether the employee was apprised of the policy, and if so, how was [s]he made aware."[9] Knowledge of a company policy may be established by evidence of a written policy, such as an employer's handbook.[10] Written policies are sufficient, though not necessary, to show that an employee was aware of the employer's expectations.[11] A key question is whether the employer clearly communicated to the employee what was expected of him or her.[12] To satisfy the just cause standard, courts

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[8] *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at *3 (Del. Super. Feb. 7, 1996).

[9] *Id*. See *Pavusa v. Tipton Trucking Co.*, 1993 WL 562196, at *4 (Del. Super. Dec. 1, 1993).

[10] *McCoy*, 1996 WL 111126, at *3.

[11] *Id.* at *3 ("Knowledge of a company policy may be established where there is evidence of a written policy...")

[12] *See Smoot v. Comcast Cablevision*, 2004 WL 2914287, at *4 (Del. Super. Dec. 16, 2004).

require more than mere inadvertence on the part on the employee.[13]

Employees discharged for just cause are disqualified from receiving unemployment insurance benefits.[14] Just cause is a "willful or wanton act in violation of either the employer's interests, or of the employees duties, or of the employer's expected standard of conduct."[15] "Willful and wanton conduct is that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance: it is unnecessary that it be founded in bad motive or malice."[16] The employer has the burden to show that the employee acted willfully or wantonly in non-compliance with the employer's policy.[17] The employer must also show that the employee received notice of the policy and was aware of the possibility that the employee's deviation may lead to termination.

The Board's decision is based upon substantial evidence in the record. Mountaire has an attendance policy that all employees must follow. The employees are given a copy of the handbook that outlines this attendance policy when they are hired. This attendance policy states that when an employee reaches six attendance occurrences he or she will be terminated. When Irvin reached his fifth occurrence on December 2, 2008, he was given

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[13] *Country Life Homes, Inc., v. Unemployment Ins. Appeal Bd.*, 2007 WL 1519520, at *2 (Del. Super. May 8, 2007).

[14] 19 *Del.C.* § 3314(2).

[15] *Krouse v. Cape Henlopen School. Dist.*, 1997 WL 817846, at *3 (Del. Super. Oct. 28, 1997).

[16] *Barton v. Innolink Sys., Inc.*, 2004 WL 1284203, at *1 (Del. Super. May 28, 2004).

[17] *Id.* at *1.

a one-day suspension and placed on notice that any further occurrences would result in his termination. Irvin was absent from work due to a transportation problem on January 29, 2010. He then failed to clock-in on February 2, 2010, which gave him 6.5 occurrences and resulted in his termination.

In the twelve months leading up to Irvin's termination, Irvin was absent 20 times and failed to punch in four times. Irvin believes that because he had medical documentation for many of his absences that he should not have received all of the documented occurrences which resulted in his termination. Irvin's argument is without merit. Mountaire's attendance policy states that if an employee is absent for two or more consecutive days, then each day will be considered as a separate occurrence unless the employee has an authorized medical certification stating that the employee can not work, in which case only one occurrence will be awarded. The result of Mountaire's attendance policy is that instead of receiving an occurrence for each day of work he missed, Irvin only received one occurrence for each group of consecutive days he was absent in which he presented medical documentation. The record shows that Irvin was warned about his future conduct and was at risk for termination. When an employee is so warned of his deviation from the policy, then a subsequent violation of a similar nature is subject to a just cause dismissal.[18] Even calculating Irvin's attendance in a light most favorable to him, there is substantial evidence to support the Board's decision that Irvin had too many occurrences and was terminated in accordance with an employer policy of which he was aware and that he was given due warning before the termination occurred.

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

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: Prothonotary
Unemployment Insurance Appeal Board