

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
1 THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947
(302) 856-5257

October 17, 2012

Barbara J. Summers
6 Chicory Drive
Georgetown, Delaware 19947

Re: *Summers v. Grace Visitation Services t/a Visiting Angels*
C.A. No. S12A-05-003

On Appeal from the Unemployment Insurance Appeal Board: AFFIRMED

Date Submitted: September 27, 2012

Date Decided: October 17, 2012

Dear Ms. Summers:

Barbara Summers appeals the decision of the Unemployment Insurance Appeal Board (“the Board”) that affirmed an Appeals Referee’s determination that Ms. Summers had been discharged from her place of employment for just cause in connection with that employment. The Board’s decision is affirmed for the reasons stated below.

Nature and Stage of the Proceedings

Ms. Summers was employed by Grace Visitation Services t/a Visiting Angels (“Employer”) as a home health care aide from July 21, 2011, until she was terminated on September 27, 2011. A Claims Deputy reviewed Mr. Johnson’s application for unemployment benefits and determined Ms. Summers had been terminated for just cause

for violating Employer's company policy. Specifically, the Claims Deputy found Ms. Summers was terminated because she left one of Employer's clients in the care of another individual without Employer's permission. Accordingly, the Claims Deputy concluded Ms. Summers was disqualified from the receipt of benefits. Ms. Summers appealed that determination and a hearing was held before an Appeals Referee on December 14, 2011. The Appeals Referee affirmed the Claims Deputy's determination. Ms. Summers appealed to the Board, which held a hearing on April 18, 2012. Subsequently, the Board affirmed the denial of benefits. Ms. Summers now appeals to this Court.

Discussion

When reviewing the decisions of the Board, this Court must determine whether the Board's findings and conclusions of law are free from legal error and are supported by substantial evidence in the record.¹ "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."² The Court's review is limited: "It is not the appellate court's role to weigh the evidence, determine credibility questions or make its own factual findings, but merely to decide if the evidence

¹ *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265 (Del. 1981); *Pochvatilla v. U.S. Postal Serv.*, 1997 WL 524062 (Del. Super.); 19 *Del. C.* § 3323(a) ("In any judicial proceeding under this section, the findings of the [Board] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.").

² *Gorrell v. Division of Vocational Rehab.*, 1996 WL 453356, at *2 (Del. Super.).

is legally adequate to support the agency’s factual findings.”³

³ *McManus v. Christiana Serv. Co.*, 1197 WL 127953, at *1 (Del. Super.).

Section 3314 of Title 19 of the Delaware Code provides, in pertinent part, that one shall be disqualified for unemployment benefits if he has been “discharged from [his] work for just cause in connection with [his] work.”⁴ “Generally, the term ‘just cause’ refers to a wilful or wanton act in violation of either the employer’s interest, or of the employee’s duties, or of the employee’s expected standard of conduct.”⁵ Where a decision to terminate an employee is based upon misconduct, the employer has the burden of establishing the misconduct.⁶ Violation of a reasonable company policy may constitute just cause for termination, provided the employee is aware of the policy and the fact that termination may result for the violation thereof.⁷ Knowledge of a company policy may be established by evidence of a written policy, *i.e.*, an employer’s handbook.⁸

With regard to Ms. Summers’ claim for benefits, the Board held:

In this case, the Claimant was discharged based upon allegations that she left a client with a friend to attend a luncheon. This violation was substantiated by live witness testimony by the Claimant’s supervisor before the Appeals Referee. The Claimant admitted to her conduct before the Board.

The Employer’s policies in this matter were clear and unequivocal. Abandonment of a client/care recipient is a dischargeable offense – even for

⁴ 19 *Del. C.* § 3314(2).

⁵ *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967).

⁶ *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at *3 (Del. Super.).

⁷ *Burgos v. Perdue Farms, Inc.*, 2011 WL 1487076, at *2 (Del. Super.).

⁸ *Id.*

a first time offense. The Claimant signed an acknowledgement [sic] of the receipt of those policies on [September] 6, 2011. She further specifically initialed the policy regarding leaving a client alone. While the Claimant contends the client was not technically “alone” – as she was left in the care of a friend – the policy indicates that the employee cannot leave the client without contacting the office and arranging a replacement. The Claimant did not do this. Even leaving to conduct errands had to be approved by management. The Claimant did not seek approval to have the client’s “friend” substitute for her. The Claimant was responsible for this client. Even though the client was not technically “alone”, the Board finds that by not following the policy and contacting the Employer for authorization or a replacement prior to leaving her charge with someone unknown to the Employer, this constituted abandoning the client.

The Board concludes that the Employer has met its burden of proving that the Claimant was discharged for just cause within the meaning of 19 *Del. C.* § 3314(2). Accordingly, the Claimant is disqualified from the receipt of unemployment benefits.

On appeal, Ms. Summers’ arguments may be summarized as follows: (1) one of the initial reasons Employer cited for terminating Ms. Summers was not supported by the evidence presented below; (2) Employer selectively applied its company policy to her actions; and (3) Ms. Summers did not technically “abandon” Employer’s client in violation of company policy.

1. The Board did not improperly rely on contested testimony.

At the Appeals Referee hearing, a representative for Employer testified that Ms. Summers had violated company policy by discussing her pay in front of a client. Ms. Summers vehemently contested this testimony at the hearing. The Appeals Referee acknowledged this disagreement and did not rely upon Employer’s allegation that Ms.

Summers had discussed her pay in front of a client in concluding Ms. Summers was disqualified from the receipt of benefits. Likewise, the Board did not rely on Employer's allegation that Ms. Summers discussed pay in front of a client. Because the contested testimony was not relied upon by either the Appeals Referee or the Board, Ms. Summers' argument on appeal is moot.

2. Employer is entitled to enforce its company policy whenever it chooses.

Ms. Summers alleges that Employer had previously permitted her to leave her client with a client's friend while Ms. Summers attended a meeting and, therefore, Employer could not fire her for doing so on this occasion.

Employer's company handbook provides:

Consumers should never be left alone. Exceptions would be errands or grocery shopping approved by management. If a consumer becomes agitated and orders you to leave, DO NOT LEAVE. Explain you must call the office and do so immediately. If you are physically threatened or in danger, you may leave the premise but immediately notify the office and the proper authorities when necessary. If you have a personal emergency and must leave, call the office and we will arrange for a replacement.

Ms. Summers signed an acknowledgment that she had received the employee handbook on September 6, 2011. In addition, Ms. Summers signed the Caregiver Restrictive Covenant Agreement after completing training and prior to beginning work. The Caregiver Restrictive Covenant Agreement provides: "You agree that you will not abandon the client at any time."

The employee handbook also provides that certain actions could result in immediate termination, including the abandonment of a care recipient.

Ms. Summers appears to acknowledge that she received permission from Employer to leave her client on this previous occasion to which she cites. The fact that she received permission would distinguish that situation from the one for which she was terminated. Nevertheless, Employer is free to enforce its company policy when it opts to do so. An

Employer's prior decision not to enforce a company policy does not protect Ms. Summers from the consequences from future violations thereof.⁹

Similarly, Ms. Summers argues that Employer may not enforce its policy because it failed to comply with its own policy because it failed to require her to have a physical examination, failed to require her to submit to TB testing, and allegedly permitted Employer's representative to use obscene and vulgar language with Ms. Summers' client.

Ms. Summers attempts to introduce new evidence. This is neither the time nor the place to do so. Nevertheless, the new evidence is completely immaterial to the matter at hand and does not affect the Board's determination that Ms. Summers was terminated with just cause related to her employment.

3. Ms. Summers' decision to leave her client with another individual without contacting Employer for permission constituted "abandonment" as contemplated by company policy.

The Board concluded, and the Court concurs, that the term abandonment clearly means to leave the employee without permission. There can be no other reasonable construction of the term, particularly in light of the obvious fact that Employer is legally responsible for a client when providing twenty-four hour care to her. To hold otherwise; namely, to permit an employee to hand off care of a client to a non-employee, at any time

⁹ See *Curry v. Unemployment Ins. App. Bd.*, 1994 WL 315222, at *3 (Del. Super.) (noting an employee's actions can constitute willful or wanton misconduct even if her direct supervisor engaged in the same behavior thereby "authorizing" it, provided the conduct is in violation of the employer's company policy).

and for any reason, would make absolutely no rational business or logical sense. The Board's construction of Employer's company policy is supported by substantial evidence and is free from legal error.

Conclusion

The Board's decision finding Ms. Summers was terminated for just cause in connection with her employment is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary
cc: Unemployment Insurance Appeal Board
Grace Visitation Services