IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL CHRISTOPHER DESIGNS	)	
	)	CIVIL ACTION NUMBER
Appellant	)	
	)	09A-12-012-JOH
v.	)	
	)	
NICOLE WILLEY and UNEMPLOYMENT INSURANCE APPEAL BOARD	)	
	)	
Appellees	)	
	)	

Submitted: March 9, 2011
Decided: June 8, 2011

MEMORANDUM OPINION

Upon Appeal From the Unemployment Insurance Appeal Board - AFFIRMED

Appearances:

James P. Hall, Esquire, of Phillips Goldman & Spence, Wilmington, Delaware, Attorney for Michael Christopher Designs, Appellant

Nicole Willey, 40 Charles Drive, Springfields, New Castle, Delaware, Pro Se Appellee

Katisha D. Fortune, Esquire, Department of Justice, Wilmington, Delaware, attorney for Unemployment Insurance Appeal Board, Appellee

HERLIHY, Judge

Facts & Procedural Posture

This appeal stems from an exchange of text messages between two employees of Michael Christopher Designs (MCD) on March 3, 2009. Nicole Willey ("Willey") and Dottie M. ("Dottie"). The two women worked together as receptionists near the front of the MCD salon, along with several other employees. The dispute between the two stemmed from another incident, where MCD management confronted both women about alleged sharing of prescription medication with another employee.[1] Willey and Dottie apparently had a disagreement about their roles in this incident, which culminated in a heated and profane argument via text message, while neither employee was at work or scheduled to work. Some of the text messages were entered into the record at the initial hearing with the appeals referee. The content of those messages is as follows, although it is unclear from the record in which order they were sent between Willey and Dottie:

> Dottie: f*** you 2 tell mike come on over im a junkie ur rite
>
> Dottie: ill b sorry?! that a threat? U stupid poor bitch. I want my money. Ill take u to court if I have too. Ps go f*** urself. I already talked john.
>
> Willey: Hope u aint at work 2mor. Ur gonna b sorry. U ever tex me again I will come over there myself 2nite and settle it u loser! Big mouth c***! Paul 2 good 4 u! He will know truth! And jon dont like u!
>
> Willey: Go take a pill and die! And don't tex sara u actin all gheto! Grow up
>
> Willey: F*** U 2! U LOST GOOD FRIENDS…

[1] A-26.

Willey: Quit tex madison. U made ass of urself whole place thinks ur waked! Heard betty told u 2 go 2 source. Did u quit? When u out there w betty? Leave jon alone! Or u will b sorry. Ur proving that ur nothing but loud mouth trouble maker! No body wants 2 deal with u! Think ur nuts!

Willey: Leave us alone. Like I said deal with u and sara deal with u 2 Jr face c***! Im f***** pissed and sara ready 2 come over there.[2]

After the exchange, Dottie went to work for the purpose of showing the messages to her supervisor, John Przbylski.[3] She then forwarded the messages from her phone to John's phone, and John subsequently forwarded the messages to Betty Armstrong, his supervisor. Both John and Betty spoke to Dottie, and fired Willey when she arrived for work the following day.

Willey was fired on March 4, 2009, and filed a claim for unemployment benefits on April 6, 2009. Her claim was denied by a claims deputy on April 23, 2009, who held that she was fired for just cause in connection with her employment due to frequent tardiness and harassing a fellow employee via text message.[4] As proof, MCD offered a note from Betty on lined paper regarding speaking about Willey's lateness, and a misconduct notice dated 2/26/09, which John noted Willey "refused to sign."[5]

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[2] A-14 - A-20.

[3] A-29, 52.

[4] A-7.

[5] A-5, A-6.

The initial denial of benefits was affirmed by the appeals referee on May 28, 2009. In the hearing before the appeals referee, Willey testified, and John represented MCD. John testified to basic facts about Willey's position at MCD and the nature of the argument from his perspective. Willey had worked as a receptionist for MCD since August 2002, for 9-12 hours per week at 12 dollars per hour. He confirmed that the argument took place on March, 3, 2009, while neither employee was working.[6] When asked if Willey was fired for threatening Dottie, he replied "[t]he reason, well we couldn't have the two of them working at the front of the salon with this disagreement between the two of them."[7] He also informed the referee that while Dottie was not fired, she had not been given any hours to work.[8] Willey admitted to the text exchange, but claims she did not start it. Instead, she claims that Dottie started the argument by calling her a "white trash loser" when Willey asked why Dottie had gotten involved with another, unrelated, employee dispute.[9] This allegedly began the argument between Willey and Dottie. Willey also contended to the Appeals Referee that Dottie only forwarded select texts to John, and that not all the texts exchanged are in the record.[10] She also testified that she took her texts to work the next

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[6] Appeal Referee Hearing Tr. 18:10-11.

[7] *Id.* 10:11-15.

[8] *Id.* 13:19-20.

[9] *Id.* 15:17-18.

[10] *Id.* 15:18-19, 16:15.

day, and that her supervisor, Betty, refused to look at them, firing her on the spot. Willey is no longer able to access the text messages.[11] After Willey testified, John addmitted that he could not say who started the argument, and that "he's sure" Dottie did not send him all the text messages that were exchanged.[12] The appeals referee affirmed the denial of benefits under the "just cause for termination" standard, holding that "just cause exists where the claimant commits a wilful or wanton act…in violation of the employer's interest, her duties to the employer or her expected standard of conduct."[13] The appeals referee did not address the nexus issue, which is required when an employee is fired for conduct occurring outside the workplace.[14]

Willey thereafter appealed to the Unemployment Insurance Appeal Board ("the Board"), and a hearing was held on August 5, 2009. Willey testified again, and Betty testified on behalf of MCD. At the hearing, Willey again admitted that she wrote the text messages, but defended herself, claiming that it was the general policy of MCD for employees to settle differences among themselves outside of the workplace, rather than bringing every dispute to the management.[15] She also reiterated that the argument occurred

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[11] *Id.* 16:16-22.

[12] *Id.* 17:14-24.

[13] A-13.

[14] *Freeman v. Burris Foods*, 2007 WL 949495 at *3 (Del. Super.).

[15] Appeal Board Hearing Tr. 4:17-20.

while not at work, there were other text messages sent by Dottie, instigating the exchange, that their supervisors refused to read, and that Willey herself was no longer able to access.[16] Willey also added that several months previously she and Dottie had another argument, involving other employees, that began outside of work but was resolved shortly after she came to work.[17] This time, Betty represented MCD at the hearing. Betty argued that she found the one text message to be of a threatening nature, and that is why she fired Willey.[18] She also claimed Willey had a problem with lateness, but did not give any specific examples about the nature and duration of this alleged problem.[19] The Board reversed the previous denials, granting Willey benefits.

In its written opinion, the Board emphasized the fact that this dispute was outside of the workplace, and that MCD had not presented enough evidence to show that the incident established an actual detrimental interest to its interest as an employer. It held that:

> Whatever was related by the second employee can only be given the limited consideration to which hearsay evidence is entitled. Neither the Employer's Representative below nor the representative before the Board were percipient witnesses to the events and cannot provide competent evidence. The issue of employees acting badly aside, the Board cannot find that the Employer has presented substantial evidence sufficient to sustain a finding of just-cause

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[16] *Id.* 5:11-19.

[17] *Id.* 6:15-23.

[18] *Id.* 7:9-12.

[19] *Id.* 7:17-19. Additionally, the alleged lateness issue has not been appealed and will not be considered by this Court.

termination.[20]

MCD appealed the Board's decision on December 21, 2009.

Parties' Contentions

MCD makes two arguments. First, that the Board's written decision appeared to characterize both John and Betty's testimony as incompetent or containing hearsay, and such characterization was not supported by substantial evidence and is the product of legal error. Specifically, MCD argues that John and Betty's testimonies were not hearsay, but instead they were testifying as lay witnesses with personal knowledge of the events and how it would effect the work environment at the MCD salon. MCD also argues that even if the Court determines their testimony to contain hearsay, that the Board improperly excluded it, as administrative Boards may consider hearsay evidence. Second, MCD contends that the Board's finding that there was a lack of a sufficient nexus between Willey's misconduct and job performance is not supported by substantial evidence and is the product of legal error. Neither Willey nor the Board filed a response to MCD's appeal.

Applicable Standard

On an appeal from the Board, the Court's role is to ascertain whether the Board's conclusions are supported by substantial evidence and free from legal error.[21] The Superior

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[20] A-45.

[21] *Gen. Motors Corp. v. Jarrell*, 493 A.2d 978, 980 (Del. Super. 1985).

Court is limited to consideration of the record.[22]

Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[23] This standard of review requires the reviewing court to search the entire record to determine whether, on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.[24] The Court will consider the record in the light most favorable to the party prevailing below.[25] Questions of conflict in testimony and witness credibility are resolved by the fact finder, be it the Board or referee, and not by the Court.[26] The Board's decision must be affirmed if it is supported by substantial evidence and there is no mistake of law.[27]

Discussion

MCD's first argument is that the Board improperly designated certain evidence as hearsay, implying that if the Board had not done so, it would have denied Willey benefits. Hearsay evidence is permissible in certain administrative hearings, but the administrative

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[22] *Petty v. U. of Del.*, 450 A.2d 392, 396 (Del. 1982).

[23] *DABCC v. Newsome*, 690 A.2d 906, 910 (Del. 1996).

[24] *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980).

[25] *Stigars v. Speakman Co.*, Del. Super., C.A.No. 92A-08-21, Herlihy, J. (March 19, 1993), *aff'd.*, No. 125, 1993, Moore, J. (September 28, 1993).

[26] *Shively v. Klein*, 551 A.2d 41, 45 (Del. 1988).

[27] *A. Mazzetti & Sons, Inc. v. Ruffin*, 437 A.2d 1120 (Del. 1981).

board may not rely upon such evidence as the *sole* basis for its decision.[28] The purpose of allowing Boards to accept evidence that would not normally be allowed in a trial setting is to free the boards and commissions from technical rules preventing the invalidation of administrative orders on appeal when such evidence was presented before them.[29] Despite this relaxed standard, there must also be competent evidence of probative value in order to support the Board's findings.

MCD argues that the Board improperly specified whatever Dottie may have told the testifying supervisors as hearsay, because they never actually testified as to statements made by Dottie. Instead, they only described how they became aware of the incident, their reactions to the nature of the text messages, and their decision to fire Willey. MCD also asserts that the Board improperly "appeared to have considered the evidence presented by the MCD supervisors as hearsay because they were not precipient witnesses to the event and therefore cannot provide competent evidence."[30]

MCD is correct in this assertion; the Board has wide discretion to hear a broad range of evidence outside of the bounds of the Rules of Evidence. However, it also has discretion on how much weight it gives the evidence it hears. Questions of conflict in testimony and witness credibility are resolved by the fact finder, be it the Board or referee,

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[28] *Larkin v. Gettier & Assoc.*, 1997 WL 717792 at *3 (Del. Super. 1997), citing *Geegan v. Unemployment Compensation Comm'n*, 76 A.2d 116, 117 (Del. 1950).

[29] *Id.*

[30] MCD Opening Br. at 8-9.

and not by the Court.[31] Just because MCD thinks that the Board might have mischaracterized certain evidence as "hearsay," does not mean that it actually did. Again, the Board's opinion merely stated that:

> Whatever was related by the second employee can only be given the limited consideration to which hearsay evidence is entitled. Neither the Employer's Representative below nor the representative before the Board were percipient witnesses to the events and cannot provide competent evidence. The issue of employees acting badly aside, the Board cannot find that the Employer has presented substantial evidence sufficient to sustain a finding of just-cause termination.

While MCD is correct in its assertion that John and Betty's testimony was permissible as to personal knowledge of their own reactions to the text messages, the result is not altered. John and Betty were not present when the text messages were sent, and therefore have no personal knowledge and cannot testify as to either Dottie or Willey's state of mind during the argument. The Board held that John and Betty were not present during the exchange of text messages. They did not know who started the exchange, only Dottie and Willey know that. The text messages were sent from Dottie's phone, but Willey testified that these were not all the text messages in the exchange. John also testified that he was "sure" Dottie did not reveal all the text messages to him, and that Willey was fired because he thought she and Dottie would no longer be able to work together at the front of the salon. Neither Dottie, John or Betty ever felt the need to go to the police because of Willey's messages, and did not take any measures to keep Willey away from the work

[31] *Shively*, 551 A.2d at 45.

place, both of which would have been prudent actions if they actually thought Willey was an imminent threat to Dottie. Whatever passed through the minds of the Board members when analyzing the hearing testimony and record. It is not this Court's role to weigh the evidence. It is not this Court's role to determine whether the Board should have found differently.

The Board reversed the prior denial of benefits because it deemed that the connection between the out of work conduct and impact on the employer was too speculative to determine that Willey had been fired for just cause for the purposes of awarding unemployment benefits. Out-of-workplace misconduct can be the basis for just-cause termination, but only if there is a sufficient nexus between that misconduct and job performance.[32] The nexus must actually be detrimental to the employer's interest and not merely speculative.[33] There is substantial evidence in record to support the Board's finding that there was an insufficient nexus between out of workplace conduct and an Willey's duties as a receptionist at MCD. Willey and Dottie had argued outside of the workplace several months prior to this incident. The two employees resolved their issues upon returning to work and were able to work together. There was no reason why the two employees could not have resolved their issues a second time. The "paper" (text) argument

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[32] *Baynard v. Kent County Motor Sales Co., Inc.*, 1988 WL 31972 (Del. Super.).

[33] *Banks v. Dept. of Community Affairs & Economic Development*, 1982 WL 173143 (Del. Super.).

took place outside of work, and had yet to manifest itself within the workplace or effect job performance. The Board fairly and reasonably reached its conclusion, and substantial evidence exists in the record that is adequate to support that conclusion.

Conclusion

For the reasons stated herein, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

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J.