SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

P.O. Box 746
COURTHOUSE
GEORGETOWN, DE 19947

April 7, 2004

A. Dean Betts, Jr., Esquire
Betts & Betts, P.A.
15 South Race Street
P.O. Box 770
Georgetown, DE 19947

Marshall J. Wynne
28435 W. Meadowview Drive
Milton, DE 19968

RE: Advanced Wall Systems v. Marshall J. Wynne
C.A. No. 03A-06-002 RFS

Date Submitted: January 14, 2004

Dear Mssrs. Betts and Wynne:

This is my decision on Advanced Wall Systems' ("Advanced") appeal of the Unemployment Insurance Appeal Board's (the "Board") decision awarding Marshall J. Wynne ("Wynne") unemployment benefits. The Board found that Wynne's employer, Advanced, did not have just cause to terminate his employment, rendering him eligible for unemployment benefits. Wynne was employed by Advanced as a "Dryvit" installer. Advanced argued that it terminated Wynne because of his poor attitude and performance. The Board found that he was terminated because of a single unexcused absence. I have reversed the Board's decision for the reasons stated herein.

DISCUSSION

A. Standard of Review

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence,[1] and to review questions of law *de novo*.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[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]

B. The Board's findings are not supported by substantial evidence.

The record below fails to provide substantial evidence for the Board's finding that Wynne was terminated from his employment because of a written policy that three unexcused absences will result in termination. It is clear from the record that Wynne was not terminated solely as a result of the January 21, 2003 incident, where Wynne left the job site without permission prior to finishing his work. Rather, the record supports a finding that Wynne was terminated due to problems with his performance and his attitude. Advanced testified that it informed Wynne that his job was in jeopardy and that he would be terminated if his work ethic did not improve. Wynne even stated during the

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[1] *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

[2] *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962).

[3] *Oceanport Indus. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrsyler Corp.*, 517 A.2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986).

[4] *Johnson*, 213 A.2d at 66.

[5] 19 *Del. C.* § 3323.

hearing that, "[w]hen he told me I was discharged he said it was for my attitude."[6] A Board member responded by stating that, "I thought you were discharged because you left the job and didn't tell anybody."[7] Wynne then said that, "the day he fired me he told me it was for my attitude."[8] Wynne made a similar claim on his application for unemployment benefits where he stated that he was discharged because Advanced didn't like his attitude.[9] Wynne's decision to leave the job site early on January 21, 2003, without completing the work or putting the supplies away, was merely the last straw for Advanced.

Despite evidence to the contrary, the Board found that Wynne was terminated without just cause and, therefore, was eligible for unemployment benefits. The Board concluded that Wynne had three unexcused absences prior to the January 21, 2003 incident, but was not terminated. Based on this, the Board found that Advanced did not have just cause to terminate Wynne because it failed to follow its own policy. However, Advanced did not implement the unexcused absence policy until December 2002. Wynne signed the policy on December 8, 2002. The policy provided that three unexcused absences would result in termination. The record indicates that Wynne had at least four unexcused absences during his employment with Advanced. However, testimony by Advanced's representative and time sheets submitted into evidence indicate that any tardiness or unexcused absence occurred prior to the implementation of the written policy. Therefore, the written policy does not apply here.

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[6]R. at 68.

[7]R. at 68.

[8]R. at 68.

[9]R. at 1.

Only where an employee is discharged for just cause does he forfeit his unemployment benefits.[10] Delaware Courts have defined "just cause" "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."[11] It is well established that "[w]ilful or wanton conduct requires a showing that 'one was conscious of his conduct or recklessly indifferent of its consequences ... [but][it] need not necessarily connote bad motive ... or malice.'"[12] In determining just cause, "[e]mployee performance and conduct is highly relevant."[13] However, misconduct will not give rise to just cause for termination where "an employer has consistently tolerated certain misconduct on the part of an employee, or when an employer has already punished the employee by a mere verbal reprimand."[14] Moreover, "just cause includes notice to the employee in the form of a final warning that further poor behavior or performance may lead to termination."[15]

The Referee and Claims Deputy found that Advanced had just cause to terminate Wynne. I agree. Wynne was warned on several occasions that he would be terminated if his performance and attitude did not improve. Furthermore, his decision to leave work early on January 21, 2003, without permission, and without putting away the supplies, was made with a reckless disregard of the

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[10] 19 *Del. C.* § 3315(2).

[11] *Avon Products, Inc. v. Wilson*, 513 A.2d 1315 (Del. 1986), *citing Abex Corporation v. Todd*, 235 A.2d 271, 272 (Del. Super. Ct. 1967).

[12] *E.I. DuPont Nemours and Co. v. Downes*, 2003 WL 23274837 (Del. Super. Ct.), at *2, *quoting Coleman v. Dep't of Labor*, 288 A.2d 285, 288 (Del. Super. Ct. 1972).

[13] *Pinghera v. Creative Home Solutions, Inc.*, 2002 WL 31814887 (Del. Super. Ct.), at *2, *citing Abex Corp. V. Todd*, 235 A.2d 271, 272 (Del. Super. Ct. 1967) (citations omitted).

[14] *Avon Products, Inc.*, 513 A.2d at 1317, *cf. Boughton v. Division of Unemployment Insurance*, 300 A.2d 25, 27 (Del. Super. Ct. 1972).

[15] *Pinghera*, 2002 WL at *2, *citing Ortiz v. Unemployment Ins. Appeal Bd.*, 317 A.2d 100 (Del. 1974); *see generally Moeller v. WSFS*, 723 A.2d 1177 (Del. 1999).

consequences of his actions and clearly against Advanced's interests. In *Pinghera v. Creative Home Solutions, Inc.*, 2002 WL 31814887 (Del. Super. Ct.), this Court found just cause to terminate an employee who was warned several times that he would be terminated if he did not improve his performance and attitude. Similar to the case at bar, the employee was given a final warning and his willful and wanton conduct, despite the final warning, constituted just cause for his termination.[16]

Upon consideration of Advanced's opening brief, recognizing that any opposition thereto has been abandoned,[17] I find that there is not substantial evidence to support the Board's finding that Advanced terminated Wynne without just cause and solely because of the incident on January 21, 2003.

CONCLUSION

The Unemployment Insurance Appeal Board's decision is reversed for the reasons stated herein.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

ESB:tll
cc: Prothonotary's Office
Unemployment Insurance Appeal Board

[16]*Pinghera*, 2002 WL. at *2.

[17]Wynne failed to file an answering brief in opposition to Advanced's appeal.