

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

December 20, 2011

Mark Conway  
28420 W. Springside Drive  
Milton, Delaware 19968

**Re: *Conway v. Allen Family Foods;***  
**C.A. No. S11A-03-005**

On Appeal from the Unemployment Insurance Appeal Board:AFFIRMED

Date Submitted: December 9, 2011

Date Decided: December 20, 2011

Dear Mr. Conway:

Mark Conway appeals the decision of the Unemployment Insurance Appeal Board (“the Board”) that dismissed Mr. Conway’s appeal from an Appeals Referee’s determination that Mr. Conway had been discharged from his place of employment for just cause in connection with that employment. The Board dismissed the appeal because Mr. Conway failed to appear to prosecute his appeal. The Board’s decision is affirmed for the reasons stated below.

**Nature and Stage of the Proceedings**

Mr. Conway was employed by Allen Family Foods (“Employer”) from February 9, 2009, until November 19, 2010. On November 19, 2010, Mr. Conway was terminated due to

his violation of Employer's "no-fault" absence policy. Under the terms of the policy, of which Mr. Conway was aware, an employee can accrue ten absences in a calendar year. Mr. Conway received written notices indicating the number of occurrences he had as of the date of the notice. Mr. Conway signed these notices, indicating his receipt thereof. On October 7, 2010, Mr. Conway signed the last of these notices, which informed Mr. Conway that he had 9.5 occurrences as of that date. Mr. Conway was absent from work on October 15, 2010, and was late reporting for duty on November 19, 2010. He was subsequently terminated.

Mr. Conway argued before the Appeals Referee that two absences in July should not have been counted as occurrences because he received medical care. Mr. Conway went to the emergency room of Beebe Hospital, where he was treated and released that day. Mr. Conway also argued the November 19, 2010, occurrence should not be counted against him because he contacted his supervisor to inform his supervisor that he would be late and his supervisor said "not to worry about it."

The Appeals Referee examined Employer's no-fault absence policy and concluded Mr. Conway was discharged for just cause in connection with his work. Indeed, the Appeals Referee found that Mr. Conway's late report on November 19, 2010, brought his total occurrences to 11.5. Mr. Conway appealed the Appeals Referee's decision to the Board. Mr. Conway failed to appear at the scheduled Board hearing on March 2, 2011. As a result, the appeal was dismissed because of Mr. Conway's failure to prosecute his appeal. Mr. Conway appeals the Board's decision 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.<sup>1</sup> "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>2</sup> 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 is legally adequate to support the agency's factual findings."<sup>3</sup>

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."<sup>4</sup> "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."<sup>5</sup> Where a decision to terminate an employee is

---

<sup>1</sup> *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.").

<sup>2</sup> *Gorrell v. Division of Vocational Rehab.*, 1996 WL 453356, at \*2 (Del. Super.).

<sup>3</sup> *McManus v. Christiana Serv. Co.*, 1197 WL 127953, at \*1 (Del. Super.).

<sup>4</sup> 19 Del. C. § 3314(2).

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

based upon misconduct, the employer has the burden of establishing the misconduct.<sup>6</sup>

On appeal, Mr. Conway attempts to revisit the facts surrounding his absences in July 2010 and his tardiness on November 19, 2010. Not only is it inappropriate for the reviewing court to engage in fact-finding, the Court disposes of Mr. Conway's appeal for procedural reasons.

---

<sup>6</sup> *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at \*3 (Del. Super. Feb. 7, 1996).

Section 3322 of Title 19 of the Delaware Code provides, “[J]udicial review [of a Board decision] ... shall be permitted only after any party claiming to be aggrieved thereby has exhausted all administrative remedies as provided by this chapter.”<sup>7</sup> This Court is without jurisdiction to hear the merits of a case where a party has not exhausted his administrative remedies because he failed to appear at a Board hearing that he requested.<sup>8</sup> Because Mr. Conway does not appeal the Board’s exercise of discretion in dismissing his appeal thereto, there is no issue properly before the Court at this time.

### Conclusion

In light of the foregoing, the Board’s dismissal of Mr. Conway’s appeal from the Appeals Referee’s decision is AFFIRMED.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

oc: Prothonotary  
cc: Unemployment Insurance Appeal Board

---

<sup>7</sup> 19 Del. C. § 3322(a).

<sup>8</sup> *Jackson v. Murphy Marine Servs., Inc.*, 2002 WL 1288791, at \*1 (Del. Super.); compare *Filanowski v. Port Contractors, Inc.*, 2007 WL 64758 (Del. Super.) (finding the appeal not procedurally barred because (a) the party who failed to appear at the Board hearing was not the party aggrieved by the Appeals Referee’s decision and (b) the Board did not dismiss the appeal but heard evidence and decided the matter on the merits).

## Allen Family Foods