IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROSE HUNTER, Appellant	)	
v.	)	C.A. No.: 03A-05-005 PLA
FIRST USA/BANK ONE,	)	
and	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD, Appellees.	)	

Submitted: November 3, 2003
Decided: January 9, 2004

UPON APPEAL FROM A DECISION OF
THE UNEMPLOYMENT INSURANCE APPEAL BOARD

ORDER

Rose Hunter, Wilmington, Delaware, *Pro Se*, Appellant.

Employers Unity, Inc., Arvada, Colorado, Representative for First USA/Bank One, Appellee.

Mary Page Bailey, Esquire, Attorney for Unemployment Insurance Appeal Board, Appellee.

ABLEMAN, JUDGE

This 9th day of January, 2004, upon consideration of the appellant's petition pursuant to Title 19, Section 3323(a) of the Delaware Code, concerning an aggrieved party's request for judicial review by this Court of a final decision issued by the Unemployment Insurance Appeal Board, it appears to this Court that:

1.) Rose Hunter ("Appellant") was employed as an imager clerk with First USA/Bank One ("Appellee" or "Bank One") from November 2002 until January 8, 2003. The Appellant was terminated for falsifying her September 11, 2002 job application, which she had completed on Bank One's website over the Internet. Appellant's discharge stemmed from her answering "no" to the question of whether she had ever been convicted of, or plead guilty to, an offense other than a minor traffic violation. Subsequent to her hiring by Bank One, Appellee performed a background check on Appellant as part of its standardized, federally mandated, investigative procedure required for newly hired employees.

The F.B.I. background investigation revealed that the New Castle County Court of Common Pleas had convicted Appellant on February 5, 1986 for issuing a bad check in the amount of $56.66 to Sears, Roebuck & Company, and imposed fines and costs. Discovery of this information resulted in the Appellant's termination on January 17, 2003. As grounds for termination, Appellee informed Appellant that the Federal Deposit Insurance Corporation prohibits banking institutions from hiring employee candidates who exhibit Appellant's type of

background. In addition, Appellee's policies and procedures, made known to Appellant at the time of her hiring, provide for immediate termination for unsatisfactory results of pre-employment or post-employment background and criminal checks, falsification, misrepresentation or omission of material information on the employee's employment application. Appellant contended that she was unaware of the 1986 criminal charge. Later, she testified that she did not remember what she did in 1986.

2.) After her termination from Bank One, Appellant immediately filed for unemployment compensation benefits. On February 6, 2003, the Claims Deputy of the Delaware Department of Labor, Division of Unemployment Insurance, made the determination that Appellant was disqualified from receipt of benefits. After examining all the facts surrounding Appellant's discharge, the Claims Deputy concluded that Appellant had been discharged for just cause. The Claims Deputy found that Appellant's actions rose to a level of wanton or wilful misconduct. The Claims Deputy emphasized that, when discharging an employee for just cause, the burden of proof rests on the employer and requires a showing that the employee committed a willful 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. The Claims Deputy found that Bank One had satisfied its burden of proof.

3.) On February 21, 2003, Appellant timely filed an appeal from the Claims Deputy's decision. A hearing before an Appeals Referee of the Delaware Department of Labor, Division of Unemployment Insurance, was conducted on March 12, 2003. The Appellant testified before the Appeals Referee. Stu Tomkins, the employer representative from Employers Unity, Inc., testified on behalf of Appellee. On March 18, 2003, the Appeals Referee issued his decision, affirming the decision of the Claims Deputy that Appellant was discharged for just cause and was disqualified from receipt of unemployment benefits. In support of his decision, the Appeals Referee noted that the Appellant was employed in a position of trust. Because of this factor, Appellant was terminated for violating FDIC regulations that prohibit management from hiring persons who have been convicted of a crime when that said person was in a position of trust.

4.) On March 26, 2003, pursuant to 19 *Del. C.* § 3318, Appellant filed a timely appeal from the Appeals Referee's decision to the Board. In lieu of a formal hearing, the Board conducted a review of the evidence presented to the Appeals Referee, the Referee's decision, and the Appellant's Notice of Appeal. The Board issued its decision on April 16, 2003, affirming the decision of the Appeals Referee. In its decision, the Board noted that it had considered the entire record and had adopted the findings of fact and conclusions of law enumerated by the Appeals Referee. Specifically, the Board noted that Delaware law provides

that a false statement on an employment application is treated like any other form of misconduct. In consideration of this fact, the Appeals Referee did not accept the Appellant's testimony that she "forgot" about the criminal charge. The Referee found that the Appellant's omission of information about her conviction on the employment application was a willful act that disqualified her from compensation benefits. As such, the Board held that the Appeals Referee's decision was supported by substantial evidence and was free from legal error.

5.) The Board's decision became final on May 5, 2003. On May 7, 2003, Appellant filed a timely notice of appeal from the Board's decision to this Court.

6.) By letter, dated May 29, 2003, the Board notified Appellee that the Appellant had appealed from the Board's decision and enclosed a copy of the appeal with the notice. The Board instructed Appellee, if represented by an attorney, to have its attorney file an entry of appearance with the Prothonotary's Office of New Castle County. The letter was addressed to Appellee, c/o its representative, Employers Unity, Inc., P. O. Box 749000, Arvada, Colorado 80006.

7.) By letter, dated June 30, 2003, the Prothonotary's Office notified Appellee that the appeal was ready for briefing and that Appellee must be represented by local counsel in this Court in order to respond to Appellant's opening brief. The letter instructed Appellee to have its attorney file an entry of

appearance with the Court. The letter was addressed to Appellee, c/o its representative, Employers Unity, Inc., P. O. Box 749000, Arvada, Colorado 80006.

8.) By letter, dated June 30, 2003, the Prothonotary's Office also notified Appellant and Appellee that, pursuant to Rule 72(g), the Prothonotary had set the briefing schedule. Appellant's opening brief was due by July 21, 2003, Appellee's answering brief was due by August 11, 2003, and Appellant's reply brief was due by August 25, 2003. The letter was addressed to Appellee, c/o its representative, Employers Unity, Inc., P. O. Box 749000, Arvada, Colorado 80006.

9.) Appellant filed her opening brief, *pro se*, on July 21, 2003.

10.) On August 26, 2003, the Prothonotary's Office mailed a Final Delinquent Brief Notice to Appellee notifying Appellee that it must have its attorney file an entry of appearance with the Court and that its answering brief was overdue. Pursuant to Superior Court Rule 107(e), the Notice also stated that the Court would decide the issue on the papers which had been filed to date if no further action of record was taken within ten days from the date of the Notice. The Notice was addressed to Appellee, c/o its representative, Employers Unity, Inc., P. O. Box 749000, Arvada, Colorado 80006.

11.) Pursuant to Rule 107(e), the Court issued its Order, dated September 15, 2003, stating that, since no further action of record had been taken and no

further information had been provided, the Court would make its determination of the issue on the papers which had been filed.

12.) Upon a closer, and more scrupulous review of the record necessitated by the Court's Order, the Court has uncovered a discrepancy which may account for the lack of any response from the Appellee since the outset of the appeal. To explain, from the time that the Appellant appealed the Claims Deputy's decision, Employers Unity, Inc. has represented the Appellee. All correspondence, notices and transmittals sent to Appellee during the entire pre-appeal and post-appeal proceedings have been sent to Appellee, c/o its representative, Employers Unity, Inc., P. O. Box 749000, Arvada, Colorado 80006. A significant clerical error may have been made in the process, potentially resulting in Appellee never receiving any type of notification of the appeal.

On March 10, 2003, Stu Tomkins, the hearing representative from Employers Unity, Inc., sent a letter to Appellant, via overnight Airborne Express, informing her that Employers Unity, Inc. was the duly authorized representative for Bank One/First USA and enclosed documents which would be discussed at the Appeals Referee hearing on March 12, 2003 at 9:15 A.M. The Airborne Express shipping receipt indicates Stu Tomkins, as sender, with an address of Employers Unity, Inc., Lower Level Suite 10, 115 W. State Street, Media, Pennsylvania 19063. A review of the transcript of the hearing indicates that Stu Tomkins was

present at the hearing at all times and actively represented the interests of Appellee.

Additionally, the Court notes that Appellant sent a copy of her opening brief to Appellee at an incorrect address. A copy of the United States Postal Service certified mail, return receipt requested receipt, attached to the Affidavit of Mailing of Appellant's opening brief, indicates that it was sent to Appellee, c/o Employers Unity, Inc., P. O. Box 749000, Arvada, CA [no zip code], not to Arvada, Colorado. This error further compounds the confusion and miscommunication surrounding Appellee's lack of response to the appeal as Appellee, most likely, never received a copy of the appeal from the Appellant.

The initial appearance in the record of the "Arvada, Colorado" address for Appellee is found in the May 29, 2003 letter from the Board to Appellee informing Appellee of the appeal. All future correspondence to Appellee utilized this address. It is the Court's opinion that, based on Stu Tomkins' involvement on behalf of Appellee during the appeals process, all notices and correspondence should have been more properly sent to Mr. Tomkins at the local Employers Unity, Inc.'s office located in Media, Pennsylvania. It is evident, both from Mr. Tomkins' March 10 letter to Appellant and from his appearance and participation at the Appeals Referee hearing, that Employers Unity, Inc. had assumed a vested interest in representing Appellee in this matter, as most businesses would in

representing a client. As such, common sense dictates that, based on their prior proactive involvement, it would be incongruous for Mr. Tomkins, or for that matter, Employers Unity, Inc., to abruptly fail to respond to subsequent notifications sent to them concerning the appeal to this Court. Even though notifications were forwarded to Employers Unity, Inc. at its Arvada, Colorado address, the Court will not speculate why such notices did not prompt a response from either Mr. Tomkins, or from Employers Unity, Inc., other than to point to some internal miscommunications or transmission errors within Employers Unity, Inc.'s business organization.

13.) In consideration of the potential recourse available to the Court in resolving this case, it is the Court's opinion that the entry of a default judgment against Appellee would not be appropriate. The instant case is distinguishable from those cases in which an employer has failed to appear at a Board hearing and the Board dismisses the case for failure to diligently prosecute.[1] In this matter, the circumstances are such that, since the Board's decision became final on May 5, 2003, the appeal has progressed beyond the jurisdiction of the Board.[2] Likewise, in *Gorrell v. Division of Vocational Rehabilitation*, this Court held that an entry of

[1] *See, e.g., Love v. MBNA America*, 2001 WL 112101 (Del. Super. Ct.).
[2] *Henry v. Dep't of Labor*, 293 A.2d 578 (Del. Super. Ct. 1972) (holding that the Unemployment Insurance Appeal Board retains jurisdiction of a matter until the Board's decision becomes final).

default judgment by the Court is not appropriate on an appeal from an administrative agency.[3]

Rather than enter an order of default judgment, Super Court Civil Rule 72(i) provides that the Court may, "sua sponte, or upon a motion to dismiss by any party," order an appeal to be dismissed. The grounds for ordering a dismissal include untimely filing of an appeal, appealing an unappealable interlocutory order, failing to diligently prosecute the appeal by a party, failing to comply with any rule, statute or order of the Court, or for any other reason deemed by the Court to be appropriate.[4] Based on the circumstances in this case, to dismiss the appeal predicated on Appellee's failure to diligently prosecute the appeal, would also not be equitable.

In *Gorrell*, this Court denied the appellant's motion to enter a default judgment against the Board because the Board failed to file a certified copy of the record of the matter with this Court within the time required under Superior Court Civil Rule 72(e). Although the Court in *Gorrell* noted that the Board was "simply a nominal party" and "would not be affected if this Court dismissed the case," the Court went on to emphasize the importance of declining to enter an order of dismissal of the appeal.[5] To issue an order of dismissal would "[p]reclude

[3] *Gorrell v. Div. of Vocational Rehab*., 1996 WL 453356, at *2 (Del. Super. Ct.).
[4] SUPER. CT. CIV. R. 72(i).
[5] *Gorrell*, 1996 WL 453356, at *2.

Claimant from obtaining a review of this matter."[6] Based on the principles underlying the objectives of equitable justice and finality of judgment, to dismiss the appeal without attempting to notify the Appellee of the existence of the appeal at an alternative address, would be inequitable.

For the foregoing reasons, the Court can not consider the merits of the appeal at this juncture. The Court vacates its Order, dated September 15, 2003, stating that the Court would make its determination of the issue on the papers which had been filed.

Pursuant to Superior Court Civil Rule 72 (c), the Court instructs the Office of the Prothonotary to send an amended notice of appeal to Appellee, c/o **Mr. Stu Tomkins, Employers Unity, Inc., Lower Level Suite 10, 115 W. State Street, Media, PA 19063**. The amended notice shall contain: 1) a copy of the original Notice of Appeal filed by Appellant on May 7, 2003; 2) a request that Appellee have its local counsel file an entry of appearance with the Court; 3) a copy of Appellant's opening brief; and, 4) a copy of each of the two letters sent by the Prothonotary's Office on June 30, 2003 to the Appellee. Once a response is

[6] *Id*.

received from the Appellee, or from its properly admitted counsel, the Court will set forth an amended briefing schedule.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

cc: Rose Hunter
Stu Tomkins, Employers Unity, Inc.
Mary Page Bailey, Esquire
Prothonotary