

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

PHILLIP E. LUKE,)
) C.A. No. 03A-07-003 JTV
 Appellant,)
)
 v.)
)
 CHESAPEAKE UTILITIES CORPOR-))
 ATIONS and UNEMPLOYMENT))
 INSURANCE APPEAL BOARD,))
))
 Appellees.)

Submitted: October 4, 2004

Decided: January 28, 2005

William A. Denman, Esq., Parkowski, Guerke & Swayze, Dover, Delaware.
Attorney for Appellee Chesapeake Utilities.

Phillip E. Luke, Dover, Delaware. *Pro se.*

*Upon Consideration of Appellant's Appeal From
Decision of Unemployment Insurance Appeal Board*
AFFIRMED

VAUGHN, President Judge

Luke v. Chesapeake Utilities, et al.

C.A. No. 03A-07-003 JTV

January 28, 2005

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. Phillip E. Luke ("the appellant") is appealing a decision of the Unemployment Insurance Appeal Board ("the Board") which denied him unemployment insurance benefits. The appellant began employment at Chesapeake Utilities Corporation ("the employer") on May 6, 2002. In early February of 2003, the appellant was placed on suspension pending an investigation of discrepancies in his cash drawer. Based on the results of the employer's investigation, the appellant was officially discharged. On March 7, 2003, the Claims Deputy determined that the appellant was eligible for benefits based on a finding that the employer did not prove willful and wanton misconduct. The employer appealed this decision and a hearing was held before the Appeals Referee on April 16, 2003. The Referee affirmed the decision of the Claims Deputy primarily because of the lack of evidence presented by the employer to substantiate the allegations that the appellant was misappropriating funds. The employer appealed and on June 04, 2003 a hearing was held before the Board.

2. While the appeal process was ongoing, Beth Cooper, Director of Audits for the employer, performed an internal audit of the appellant's transactions dating back six months. Ms. Cooper testified before the Board on behalf of the employer and discussed the internal audit she conducted. The audit revealed several instances where there were discrepancies in the appellant's cash drawer and Ms. Cooper concluded that the appellant had been "lapping" payments he received. "Lapping"

Luke v. Chesapeake Utilities, et al.

C.A. No. 03A-07-003 JTV

January 28, 2005

is a system by which an employee receives a payment from a customer and, rather than crediting that payment to the appropriate account, the payment is credited to multiple accounts of other customers in smaller amounts while the employee retains the rest. This requires an employee to keep track of accounts that should have been credited and to later credit other payments to that account before it becomes delinquent. The audit revealed the appellant had been “lapping” payments as far back as six months and, during her testimony, Ms. Cooper submitted a report to the Board detailing the loss of funds. The Board issued a decision reversing the Referee and denying benefits.

3. The limited function of this Court in reviewing an appeal from the Unemployment Insurance Appeal Board is to determine whether the Board’s decision is supported by substantial evidence.¹ Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.² The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings.³ In other words, the Board, not the court, determines the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn therefrom.⁴ The court merely determines if the evidence

¹ *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

² *Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. Ct. 1986), *appeal dismissed*, 515 A.2d 397 (Del. 1986).

³ *Johnson*, 213 A.2d at 66.

⁴ *Behr v. Unemployment Insurance Appeal Board*, 1995 WL 109026 (Del. Super.).

Luke v. Chesapeake Utilities, et al.

C.A. No. 03A-07-003 JTV

January 28, 2005

is legally adequate to support the agency's factual findings.⁵ Therefore, if there is substantial evidence for the Board's decision, the decision will be affirmed.

4. Title 19 *Del. C.* § 3315(2) provides the standard for determining eligibility for unemployment benefits. "An individual shall be disqualified for benefits . . . if the individual was discharged from the individual's work for just cause"⁶ In a discharge case, the employer has the burden of proving by a preponderance of the evidence that the claimant was terminated for just cause. A "preponderance of the evidence" is defined to mean "the side on which the greater weight of evidence is found."⁷ Just cause is defined as a "willful 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."⁸ Misappropriation of funds amounts to willful or wanton conduct and is sufficient just cause for discharge.⁹

5. The appellant's Opening Brief and Reply Brief essentially argue the reasons why he believes he was falsely accused of taking money from his employer. He discusses a problem with the company computers resulting from a common password for multiple computers which allows any employee to access any computer. This issue was before the Board and the employer presented evidence showing that each

⁵ 29 *Del. C.* § 10142(d).

⁶ *Orona v. Little Sisters of the Poor*, 2003 WL 22810505, at *3 (Del. Super.).

⁷ *Taylor v. State*, 2000 WL 313501, at *2 (Del. Supr.).

⁸ *Majaya v. Sojourner's Place and Unemployment Ins. Appeal Bd.*, 2003 WL 21350542 (Del. Supr.).

⁹ *Price v. Blue Plate Diner*, 2003 WL 21537924, at *1 (Del. Super.).

Luke v. Chesapeake Utilities, et al.

C.A. No. 03A-07-003 JTV

January 28, 2005

employee was required to initial the receipts on deposits they received. The appellant's initials were on the receipt for the deposit that was misapplied. Based on the testimony and documentation presented, the Board determined there was sufficient evidence to discharge the appellant despite the password problem.

6. The appellant argues several other theories as to why there may have been a discrepancy in his cash drawer, including information concerning another employee's discharge for similar reasons. The appellant, however, was entitled to present this evidence and any witnesses who would testify on his behalf at the hearing before the Referee and at the hearing before the Board. This Court's role is limited to review of the record and any consideration of new evidence would be inappropriate as it is not the role of this Court to make factual findings.

7. The Referee did not find willful or wanton conduct on the part of the appellant, but he did not have the benefit of information relating to the internal audit or the testimony of Ms. Cooper. Based upon the presentation of this evidence and the information already in the record, the Board determined that the appellant had misappropriated funds. The Board's conclusion is supported by substantial evidence.

8. Therefore, the decision of the Board is **affirmed**.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary
cc: Order Distribution
File