

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

PAULA ALCOCK)	
)	CIVIL ACTION NUMBER
Plaintiff)	
)	11A-08-009-JOH
v.)	
)	
RESIDENCE INN BY MARRIOTT)	
INC. and UNEMPLOYMENT)	
INSURANCE APPEAL BOARD)	
)	
Defendant)	

Submitted: March 7, 2012

Decided: April 5, 2012

MEMORANDUM OPINION

*Upon Appeal from the Unemployment
Insurance Appeal Board - **AFFIRMED***

Appearances:

Paula Alcock, 907 Vinings Way, New Castle, Delaware, 19720, *Pro Se*

Rae Meredith Mims, Esquire, and Caroline L. Cross, Esquire, Department of Justice,
Attorneys for Unemployment Insurance Appeal Board

HERLIHY, Judge

Paula Alcock has appealed the Unemployment Insurance Appeal Board's decision denying her unemployment benefits. She submitted materials, primarily factual arguments made in the administrative proceedings below. Her former employer, Marriott Residence Inn ("Residence Inn"), after three notices from the Court has failed to submit anything in response to the appeal. A separate rule to show cause proceeding involving Marriott will ensue for its affront to the Court.

In the final delinquent brief notice sent to Residence Inn on February 28, 2012, it is stated:

As previously stated, in a letter dated December 13, 2011, Residence Inn by Marriott must be represented by local counsel in order to respond to the Openin Brief. Please have your attorney enter their appearance with the Superior Court.

* * * * *

No further action of record having been taken and no further information having been provided, it is therefore ORDERED, pursuant to Rule 107(e) that the Court will make a determination of the issue on the papers which have been filed.¹

Superior Court Civil Rule 107(f)² states in relevant part:

Failure or neglect to file briefs or discovery material. If any brief, memorandum, deposition, affidavit, or any other paper which is or should be a part of a case pending in this Court, is not served and filed within the time and in the manner required by these Rules or in accordance with any order of the Court or stipulation of counsel, the Court may, in its discretion, dismiss the proceeding if the plaintiff is in default, consider the motion as abandoned, or summarily deny or grant the motion, such as the situation

¹ Final Delinquent Brief Notice signed by Herlihy, J., on February 28, 2012.

² The notice mistakenly refers to subsection (e) and it should be (f).

may present itself, or take such other action as it deems necessary to expedite the disposition of the case.

This Rule gives broad discretion to the Court. That discretion, in an instance of an appeal from an administrative agency decision is necessarily more limited when it is the appellee which fails to file anything in connection with the appeal. The Court views its role, out of respect to Alcock, the Board, and to the underlying issue involved to decide the case on its merits.

Factual Background

Alcock started work in 1990 for the Residence Inn. She was a housekeeper, basically responsible for cleaning rooms, changing linens, towels, cleaning bathrooms, etc. In 2009, Alcock received an “Associate Handbook” with these two provisions in it:

Progressive Discipline

It is our belief that discipline should be a process that allows an individual to improve his or her understanding and the performance of his or her duties. Our discipline procedure is designed to enable the associate and his or her manager to identify and agree on areas of misunderstanding, conflict or poor performance and together outline and agree on corrective measures required preventing the same or similar difficulties in the future. When policies and procedures are not being followed, it is the responsibility of your supervisor or manager to correct the situation. This may be done in three ways: coaching and counseling, a verbal warning, or written warning. All are meant to make associates aware of concerns and give them the information and help they need to correct the situation.

* * * * *

Written Warning

This is a serious action taken by the manager in response to inappropriate behavior or when previous discipline has not been effective. An associate can be terminated under progressive discipline if he or she has two written warnings and a third incident or situation occurs within a twelve month

period, which either violates policy or rules, or indicates inappropriate behavior or poor judgment. A third written warning results in suspension for investigation, with recommendation for termination.³

Alcock received written warnings in the period May 24, 2010 through March 14, 2011. The final one was March 26, 2011 which led to her termination and this dispute. The first one, following an incident dated May 21, 2010 was for poor performance inside her rooms and showing a continuing problem in cleanliness, trash not being removed, bathrooms uncleaned, etc.⁴ She was counseled about this and informed by her manager that additional infractions or violations of company policy may result in further disciplinary action up to termination.⁵ There were similar written warnings July 25, 2010,⁶ November 11, 2010,⁷ and November 30, 2010.⁸ The March 14, 2011 written warning was for throwing out customer clothing and not turning it in to Residence Inn's lost and found.⁹

The final incident report on March 26, 2011 states:

Description of Incident: Paula turned in her board at 1:24PM and left the property. These actions led management to believe that she had completed

³ Appeal Transcript at 45-6.

⁴ *Id.* at 62.

⁵ *Id.* at 59.

⁶ *Id.* at 59.

⁷ *Id.* at 55, a warning she refused to sign.

⁸ *Id.* at 53.

⁹ *Id.* at 52.

her assigned rooms for the day. However, upon further investigation of the condition of these rooms, they were found to be poorly service [sic] and unclean, which had to be redone by two other associates on staff. These rooms included that of seven major corporate accounts, which left in their current state, would have jeopardize [sic] any future business for the facility. Paula had left the property without completing her assigned tasks, and without notifying management prior to her departure.¹⁰

She was counseled about this on March 27, 2011. This last incident led to her termination, however, on March 31, 2011.

The Appeals Referee heard most of the testimony and received the bulk of the documentary evidence in this matter. Alcock denied, in her testimony before the Referee, that she had left any rooms dirty on March 26th. The Referee, based on documentation submitted by Residence Inn's representatives and their testimony, found their version more credible and held Alcock had been discharged for cause.

Alcock appealed to the Board. As she had been before the Referee, Alcock was represented by counsel who argued and questioned Residence Inn's witness whether he had, in fact, told Alcock one more written warning meant she *would be* terminated. Alcock also testified she was warned another infraction could lead to termination but was not told that she was in danger of losing her job. The employer representative testified, however, that he told Alcock her job was in danger for her conduct. Each of the above cited notices stated she "may be" terminated if another infraction occurred.

¹⁰ *Id.* at 35.

The Board found Alcock had been terminated for failing to adequately clean rooms and had received multiple warnings. It referenced Residence Inn's progressive disciplinary policy, particularly the part stating termination may result from two or more warnings in a twelve month period. The Board affirmed the Appeals Referee. This appeal followed.

Parties' Contentions

Alcock restates basically what she argued below. She says she was not retrained after any of the incidents and told the next incident would mean termination. She also submits character references materials. She contends she was never told on March 26, 2011 that her work was incomplete.

Residence Inn failed to file anything. The Court will not, therefore, presume its arguments.

Standard of Review

This Court's function on an appeal from the Board is to determine if its decision is supported by substantial evidence and is free from legal error.¹¹ Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion.¹²

¹¹ *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238, 239 (Del. Super. 1979).

¹² *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

On appeal, the Court is limited to the record.¹³ Where, as here, the Board affirms a referee's decision after taking additional evidence, the Court relies upon the referee's determinations for the findings of fact and conclusions of law.¹⁴

Discussion

Alcock received five written warnings for incomplete or sloppy work in cleaning rooms between May 24, 2010 and March 26, 2011. There was a sixth warning for throwing out a guest's clothing rather than turning it in to the lost and found. Each warning reflects she was notified of the problems.

Residence Inn's progressive discipline policy states an employee with two written warnings who then receives a third in a twelve month period can lead to suspension with a recommendation for termination. Such written warnings result from a violation of company policy or rules or inappropriate behavior or poor judgment. The discipline policy states in two separate paragraphs that three written warnings in a twelve month period can lead to termination.

Alcock had not just three warnings about her poor job performance but five warnings, all involving the same problem, in a twelve month period. Complete cleaning, properly made beds, etc., go to the essence of what customers in a place like Residence Inn do not expect. Alcock's poor job performance was repetitive and continuing over a

¹³ *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

¹⁴ *See Boughton v. Div. of Unemployment Ins., of the Dep't of Labor*, 300 A.2d 25, 26 (Del. Super., 1972).

short period of time. She was not terminated for a variety of unrelated reasons but for reasons going to the very heart of her job duties. She was terminated for “just cause” rendering her ineligible for unemployment benefits.¹⁵

Some of Alcock’s arguments in this Court relate to the credibility of witnesses below. Those kind of decisions are for the Board and the Referee, not this Court.¹⁶ If there is a legal argument raised on the papers, which cannot be classified as a brief, it is that she should have been told that any further infractions *would* result in termination. Each of the five written warnings indicated the next could mean termination. Her argument misses the point. Residence Inn wanted some flexibility whether to terminate or take other less drastic disciplinary action. This discretion helps it and the employees. To lock in an automatic twelve months is arguably too harsh. It would ignore the possible variety of unrelated warnings for which Residence Inn might not want to terminate but take other action.

Alcock was on notice, both the employee’s handbook and the written language on each warning she received indicated she could be terminated. She cannot argue surprise or unfairness.

¹⁵ *Avon Products, Inc. v. Wilson*, 513 A.2d 1315, 1317 (Del. 1986).

¹⁶ *Delaware Alcoholic Beverage Control Comm’n v. Newsome*, 690 A.2d 906, 910 (Del. 1996). Further this Court is limited to the record below and cannot entertain the new material she has submitted for the first time on appeal.

There was more than substantial evidence to support the Board's and Referee's decisions, and they are free of legal error and must be affirmed.¹⁷

Conclusion

For the reasons stated herein, the decision of the Unemployment Insurance Appeals Board is **AFFIRMED**.

IT IS SO ORDERED.

J.

¹⁷ *General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960).