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

HERTRICH OF NEW CASTLE,	)	
	)	
Appellant/Employer Below,	)	
	)	
v.	)	C.A. No. N11A-05-014 WCC
	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD and MARJORIE MERRELL,	)	
	)	
Appellee/Claimant Below.	)	

Submitted: December 20, 2011
Decided: April 5, 2012

On Appeal from the Unemployment Insurance Appeal Board - AFFIRMED

OPINION

William J. Cattie, III, Esquire, and John A. Macconi, Jr., Esquire. Rawle & Henderson LLP, 300 Delaware Avenue, P.O. Box 588, Wilmington, DE 19899. Attorneys for Appellant/Employer.

Marjorie E. Merrell, 300 Carroll Street, Riverside, NJ 08075. *Pro se* Appellee.

CARPENTER, J.

Appellant Hertrich of New Castle ("Hertrich"), a car dealership, fired its office manager, Appellee Marjorie Merrell ("Merrell"), for inappropriate conduct at work, for failing to satisfy certain payroll responsibilities, and for using dealer tags on her personal vehicle. The Claims Deputy initially denied Merrell unemployment benefits, but that decision was reversed by the Appeals Referee and that reversal was subsequently affirmed by the Unemployment Insurance Appeal Board ("UIAB").

Upon consideration of Hertrich of New Castle's appeal from the Unemployment Insurance Appeal Board, the decision of the UIAB is hereby AFFIRMED.

BACKGROUND

Merrell originally worked as a controller for a car dealership called Castle. In September of 2010, Hertrich purchased Castle but kept Merrell as an employee. Not surprisingly, this change in ownership was somewhat chaotic for both old and new employees at the car dealership. First, Hertrich tried to update Castle's computer system, with the result that the dealership's network was slow and that employee computers were prone to shut down unexpectedly.[1] Second, while Hertrich rehired many former Castle employees—including Merrell—those

[1] R. 82, 92-93.

employees' performance expectations and job responsibilities at Hertrich in some cases differed from their performance expectations and responsibilities at Castle. Finally, Hertrich attempted to phase out management's use of dealership tags.[2]

It quickly became apparent that Merrell's supervisor, Guy Winer, was frustrated with Merrell's performance at Hertrich. Less than a month after Hertrich took over the dealership, Winer gave a written warning to Merrell for exhibiting irrational behavior at work. Several weeks later another warning was given to Merrell for yelling and belittling co-workers, and finally, on October 26, 2010, Merrell was given an employee corrective action notice for failing to timely transfer funds into Hertrich's payroll account and failing to timely pay Hertrich's payroll taxes. On the basis of these incidents, Winer decided to terminate Merrell's employment on November 12, 2010. On that day, Winer also discovered Merrell was using dealer tags on a non-Hertrich vehicle in abrogation of Hertrich policy.

Merrell filed for unemployment benefits shortly after she was fired. When the Claims Deputy denied her claim, Merrell timely appealed on the basis that the Claims Deputy did not find Hertrich fired Merrell for just cause as required by 19 *Del. C.* § 3314(2). After a hearing on the issue, the Appeals Referee reversed the

[2] R. 107.

Claims Deputy's decision and determined that Merrell qualified for unemployment benefits. Hertrich appealed the Appeals Referee's decision to the UIAB and, after another hearing on the matter, the UIAB affirmed. Hertrich now appeals the decision of the UIAB to this Court.

STANDARD OF REVIEW

When reviewing an appeal from the UIAB, the Court's role is limited to evaluating the record in the light most favorable to the prevailing party.[3] The Court evaluates the record to determine if it included substantial evidence that a reasonable mind could accept as adequate support for the UIAB's conclusions.[4] The Court also evaluates the record to verify that the UIAB's conclusions are free from legal error.[5] Substantial evidence is evidence from which an agency could fairly and reasonably reach the conclusion that it did.[6] The Court will uphold a discretionary decision of the UIAB unless it finds that there has been an abuse of discretion.[7] An abuse of discretion occurs where the Court finds that the UIAB "act[ed] arbitrarily or capriciously or exceed[ed] the bounds of reason in view of

[3] *Smoke v. Coventry Health Care*, 2011 WL 2750711, at *2 (Del. Super. July 13, 2011).
[4] *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. June 6, 2003).
[5] *Unemployment Ins. Appeal Bd. of Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).
[6] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[7] *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

the circumstances, and has ignored recognized rules of law or practice so as to produce injustice."[8]

DISCUSSION

The issue before the Court is whether the UIAB erred in ruling that Merrell's behavior and conduct did not give Hertrich just cause to terminate her employment. 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."[9] Willful or wanton conduct is evidenced by conscious action or reckless indifference leading to a deviation from acceptable workplace performance.[10] Put another way, an employer has just cause to dismiss an employee when that employee has violated the employer's policies or rules, especially when the employee had notice of the rule through a company handbook or some other documentation.[11]

Hertrich argues that it had two grounds upon which to dismiss Merrell for just cause: Merrell's pattern of conduct in the office and Merrell's use of dealership tags on her personal vehicle. If the Court agrees with either of

[8] *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008).
[9] *Smoke*, 2011 WL 2750711, at *2.
[10] *Dexter v. Purdue Farms*, 2010 WL 5556178, at *2 (Del. Super. Dec. 30, 2010).
[11] *Id.*

Hertrich's arguments, Merrell is not entitled to unemployment benefits. The Court will discuss each allegation in turn.

1. Merrell's Pattern of Conduct

Winer issued four written warnings to Merrell. In the first warning, Merrell was cited for "unacceptable behavior to customers/coworkers" for her "irrational" behavior and crying.[12] The citation shows that Merrell was having difficulty handling the pressures of her job.[13] Winer cited Merrell a second time a few weeks later, again for "unacceptable behavior to customers/coworkers," because Merrell had yelled at employees.[14] A little over a week after that incident, Winer issued two citations on the same day for Merrell's "substandard work."[15] Merrell had not timely transferred funds to cover payroll checks and had not timely paid payroll taxes.[16]

The UIAB found that Merrell's cited conduct did not amount to a pattern of conduct sufficient to give Hertrich just cause for dismissal. The UIAB considered the fact that Merrell was an office manager during a transition in ownership, and this fact put Merrell's first two emotional outbreaks in context. While Merrell's

[12] R. 23.
[13] *Id*.
[14] R. 24.
[15] R. 27.
[16] *Id*.

behavior was far from exemplary, the UIAB could properly consider the attendant chaos at the dealership "justifiable provocation" for Merrell's conduct.[17]

As to the payroll oversights, Hertrich had different expectations for its office managers than Merrell's previous employer. The UIAB heard evidence that Merrell was expected to learn new payroll clerk duties in a relatively short time, duties that Merrell was not previously responsible for during her twenty years in the car dealership business. On top of this, even witnesses for Hertrich acknowledged at the UIAB hearing that Hertrich expected Merrell to execute her responsibilities using an unreliable computer system. This evidence led the UIAB to conclude that Merrell's payroll oversights did not amount to willful or wanton conduct.

The Court finds no legal error in this conclusion. Poor job performance does not provide just cause for discharge unless substandard performance is willful or wanton.[18] Taken in the light most favorable to Merrell, the evidence shows that Merrell's conduct was the product of mistakes, misunderstandings and the natural difficulties associated with a change in ownership, not conscious

[17] *See Messina v. Future Ford Sales, Inc.*, 1997 WL 358571, at *3 (Del. Super. May 2, 1997) ("Where there is no justifiable provocation for the impending obscenity, it may properly be classified as willful misconduct.").
[18] *See Starkey v. Unemployment Ins. Appeal. Bd.*, 340 A.2d 165, 166-67 (Del. Super. 1975) ("[T]he term 'misconduct,' as used in Unemployment Compensation Statutes, does not mean mere inefficiency, unsatisfactory conduct, or failure of performance as a result of inability or incapacity, inadvertance [sic] in isolated instances or good faith errors of judgment.").

disregard or reckless indifference. The Court cannot, therefore, call Merrell's conduct willful or wanton.

Hertrich contends that these multiple citations amounted to a pattern of conduct in violation of Hertrich's interests even if none of the citations individually reflects willful or wanton misconduct. Hertrich cites *Irvin v. Mountaire Farms of Delmarva* to support its argument.[19] In *Irvin*, the Court affirmed a UIAB decision denying unemployment benefits because the employee was habitually absent from the workplace.[20] *Irvin* is inapposite to this case. The employee in *Irvin* received and signed an employee handbook informing him of his employer's attendance policy.[21] In addition, the employer warned the employee before his last absence that one more absence would result in his termination.[22] In *Irvin*, then, the pattern of absenteeism did not constitute just cause for dismissal in and of itself. Rather, the employee's absenteeism was willful and wanton because it reflected his choice to continue to behave in a way that the employer told him was unacceptable.

[19] 2011 WL 2360362 (Del. Super. May 26, 2011).
[20] *Id*. at *1.
[21] *Id*.
[22] *Id.*

In the instant case, the UIAB found Hertrich did not meet its burden of proof in presenting evidence that Merrell knew her inaction with regard to payroll responsibilities was unacceptable. Put simply, this is not a case where Merrell clearly knew what the new management expected of her and failed to meet those expectations on multiple occasions. Because of this, the Court cannot find that her multiple mistakes amounted to a pattern of willful and wanton misconduct against Hertrich's best interests.

2. **Merrell's Use of the Tags**

Hertrich contends that Merrell's use of dealership tags on her vehicle was sufficient to provide just cause for her termination. The evidence before the UIAB showed that the tags showed up on Merrell's desk in the course of the transition in management and that Merrell had reason to believe she was allowed to use the tags. Merrell used the tags openly without any objection from Hertrich's management and it was only on the day of her firing that her use of the tags was discovered by her immediate supervisor. The Court must assume the use of the tags had nothing to do with the decision to terminate her employment, since Winer had already made that decision. As such, the Court has significant concerns as to whether the UIAB should have even considered this issue and whether it is an

appropriate issue for Hertrich to now raise before this Court. But to avoid any appellate concerns, the Court will address this issue now.

The Court recognizes that an employee's expected standard of conduct is relevant in determining whether the actions of the employee constitute just cause for dismissal.[23] For this reason, the Court uses a two-prong test to determine whether termination for failing to follow a policy constitutes just cause.[24] First, the Court asks whether a policy existed, and if so, what conduct the policy prohibited.[25] Second, the Court asks whether and how the employee was made aware of the policy.[26] An employee may be made aware of a policy by writing or by previous warnings of objectionable conduct.[27]

Based on the evidence before it, the Court finds that neither of these prongs have been satisfied. The record is devoid of evidence that Merrell was on notice of any employer policy regarding use of the tags. Hertrich attached to its appeal Merrell's signed acknowledgement that she received Hertrich policies and procedures, but the acknowledgment only references policies concerning "time clock usage, smoking designated [sic], and food consumption."[28] Furthermore, if

[23] *Weaver v. Employment Sec. Comm'n*, 274 A.2d 446, 447 (Del. Super. 1971).
[24] *Dexter v. Purdue Farms*, 2010 WL 5556178, at *2 (Del. Super. Dec. 30, 2010).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] Appellant Br. Tab 2.

there is a written policy regarding the use of dealer tags, that policy was never introduced into evidence before the UIAB.

Hertrich cites the State Division of Motor Vehicles' ("DMV") manual for dealer procedures to show that Merrell violated the manual by using tags on a non-Hertrich vehicle.[29] Hertrich contends the UIAB should have considered this a violation of the Hertrich's interest giving Hertrich just cause to dismiss Merrell. But the record does not make it clear that Merrell was aware of the DMV manual, and it is far from clear that Merrell intentionally violated the DMV procedures. Under the previous management, due to her many years of service and her close relationship with Castle's owner, she was given a vehicle to utilize that had a dealer tag on it. For reasons that are unclear and unexplained, when Hertrich took over the dealership, Merrell's vehicle, titled to Castle, was not included in the inventory. However, when Merrell discussed her use of the vehicle with Winer she was told to continue to drive it, and since she did not personally own the vehicle, she believed she should continue to use a dealer tag.

It would be an understatement to say the parties were confused about the ownership status of Merrell's vehicle and whether she was given permission to continue to use that vehicle. Yet Merrell drove the same vehicle before and after

[29] Appellant Br. 10.

Hertrich took over the dealership without being questioned. From the Court's perspective, the issue with the tags is just another example of Hertrich not having been clear and precise about its policies, leading to more confusion and misunderstandings. While over time these policies perhaps would have become ingrained in the employees, it is difficult for the Court to enforce them when such uncertainty exists. In light of this evidence, the Court cannot find error in the UIAB's decision that Merrell did not willfully or wantonly use dealer tags on her personal vehicle.

CONCLUSION

Neither Hertrich nor Merrell was faultless in handling the car dealership's change in management. Hertrich was not clear about its expectations for its employees, and Merrell's professionalism during the transition process left much to be desired.

Even so, the Board's findings with regard to Merrell's conduct are factual determinations that the Court will not disturb. The Board heard testimony from the relevant parties and was in a better position than the Court to assess the parties' credibility and to determine what really occurred during the transition in management at this dealership. It is only natural that mistakes are made and misunderstandings occur when a transition of this nature takes place. And while it

may not excuse Merrell's behavior, confusion over employee responsibilities and conduct in a recently restructured workplace contextualizes her conduct in the realities of a stressful transition. If the Court was the trier of fact it would be concerned that Merrell's behavior may have developed into a pattern of conduct inconsistent with Hertrich's interests. However, that is not the Court's role in reviewing administrative appeals.[30] The Court will only overturn UIAB findings if they are arbitrary or capricious or exceed reason and common sense. [31] Under the factual circumstances here, the Court cannot make such a finding. The Court has reviewed the record and finds that the UIAB came to its conclusion based on substantial evidence and consistent with the law. For these reasons, the decision of the Unemployment Insurance Appeal Board is hereby AFFIRMED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[30] *See Starkey v. Unemployment Ins. Appeal Bd.,* 341 A.2d 165 (Del. Super. 1975) ("It is within the province of the Board, not this Court, to weigh the credibility of witnesses and resolve conflicts in testimony.").
[31] *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008).