

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EDWIN D. MASANQUE,	)
	) C.A. No. 01A-06-005
Appellant,	)
	)
v.	)
	)
PLAYTEX APPAREL, INC., and	)
UNEMPLOYMENT INSURANCE	)
APPEALS BOARD,	)
	)
Appellees.	)

Submitted: March 3, 2002

Decided: June 19, 2002

Edwin B. Masanque, Dover, Delaware. *Pro se.*

Jeremy W. Homer, Esq., Dover, Delaware. Attorney for Appellee Playtex.

*Upon Consideration of Appeal From Decision of
Unemployment Insurance Appeal Board*

AFFIRMED

VAUGHN, Resident Judge

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ORDER

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

1. Claimant Edwin D. Masanque appeals from a decision of the Unemployment Insurance Appeal Board ("Board") which denied him unemployment benefits after he was terminated from his employment with Playtex Apparel, Inc ("Playtex Apparel"). The Board upheld the decisions of both the Claims Referee and the Appeals Deputy who also found in favor of the employer.

2. The claimant began working for Playtex Apparel on January 11, 1999 as an order picker. Playtex has an attendance policy under which an employee will be terminated when he accumulates ten "occurrences." The policy is contained in a Human Resources Policy Manual, and it is not contended in this case that the claimant was unaware of the policy. Under the policy, missing a day of work and failing to give advance notification thereof are counted as two occurrences. Missing a day of work, or over half a day, is itself one occurrence. There are also fractional occurrences for tardiness and the like. There are various excused absences which are not counted, such as medical leave, funeral leave, and the like. Each employee can also use five vacation days each year as "emergency" days to offset an absence, not to exceed two days a month. Each time an employee goes three months without an occurrence, he earns an attendance card which can also be used to offset an occurrence. On the third and sixth occurrence, verbal and written counseling, respectively, are given by the employer. On the ninth occurrence, the employee is

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required to submit an action plan to avoid future absences. And, as mentioned, on the tenth occurrence, termination results.

3. By September 2000 the claimant had accumulated six occurrences. On September 8 he received the written counseling letter referred to above. By the end of December 2000 he was at seven and two-thirds occurrences. In January 2001 the claimant used his two emergency vacation days on the 15th and 23rd. He called in that he would be absent on January 27, which took him to eight and two-thirds occurrences. He then called in that he would be absent on January 29, taking him to nine and two-thirds occurrences. Normally, at this point the employee would be required to submit a plan to improve his attendance. The employer attempted to contact the claimant, both directly and through members of his family who also work for Playtex Apparel, to follow this step, but was unable to reach him. On January 30 the claimant was absent without calling in, which caused him to exceed ten occurrences. Since this exceeded the ten allowed, he was terminated. The claimant was also absent on the 31st. Based upon these facts, the Board concluded that there was just cause for the claimant's termination, and benefits were denied. The claimant contended before the Appeals Deputy and the Board, and contends here, that he was sick on the 27th and 30th. He also believes he was entitled to an emergency day on the 29th. In substance, he contends that he should not have been charged with occurrences for those days. He was unable to provide any documentation to support or verify the illness that he claimed on the 27th, 29th or 31st.

4. The limited function of this Court in reviewing an appeal from the

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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 give their testimony, and the inferences to be drawn therefrom.⁴ The Court merely determines if the evidence 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.

5. In a termination case, an employee who is terminated for “just cause” is not eligible to receive unemployment benefits.⁶ Just cause concerns "a wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the

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

² *Oceanport Ind. v. Wilmington Stevedores*, Del. Supr., 636 A.2d 892, 899 (1994); *Battisa v. Chrysler Corp.*, Del. Super., 517 A.2d 295, 297 (1986), *app. disp.*, Del. Supr., 515 A.2d 397 (1986).

³ *Johnson v. Chrysler Corp.*, 213 A.2d at 66.

⁴ *Behr v. Unemployment Insurance Appeal Board*, Del. Super., C.A. No. 94A-07-005, Ridgely, P.J. (Feb. 7, 1995) (ORDER) at 3.

⁵ 29 Del. C. §10142(d).

⁶ 19 Del. C. §3315(2).

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employee's expected standard of conduct."⁷ "[W]ilful or wanton conduct requires a showing that one was conscious of his conduct or recklessly indifferent of its consequences."⁸ The burden is on the employer to show that the employee was terminated for "just cause".⁹ "Just cause" exists where an employee violates a company rule or policy, especially where the employee is given notice of the rule, such as in a company handbook.¹⁰

6. Based upon my review of the record in this case, I am satisfied that there is substantial evidence to support the Board's determination that the claimant had accumulated in excess of ten occurrences and was properly terminated under the employer's attendance policy. That same evidence also supports the Board's determination that the reasons given by the claimant were insufficient and that the days in question were properly determined to be occurrences. In addition, the Board's ultimate conclusion that the termination was made with just cause is supported by the evidence and is free of legal error. Therefore, the decision of the Board must be affirmed.

⁷ *Abex Corp. v. Todd*, Del. Super., 235 A.2d 271, 272 (1967).

⁸ *Coleman v. Dept. of Labor*, Del. Super., 288 A.2d 285, 288 (1972).

⁹ *Evans v. Tansley*, Del. Supr., No. 294, 1987, Horsey, J. (March 29, 1988) (ORDER) at 4-5.

¹⁰ *See Baynard v. Kent County Motors, Inc.*, Del. Supr., 548 A.2d 778 (table), No. 119, 1988, Moore, J. (Sep. 7, 1988)(Order); *Tuttle v. Mellon Bank of Delaware*, Del. Super., 659 A.2d 786 (1995); *Farmer v. E.I. DuPont de Nemours & Co.*, Del. Super., C.A. No. 94A-06-011, Goldstein, J. (Nov. 9, 1994) (Mem. Op.).

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THEREFORE, IT IS ORDERED that the decision of the Unemployment Insurance Appeal Board is ***AFFIRMED***.

Resident Judge

oc: Prothonotary
cc: Order Distribution