

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

BRADLEY A. SHORES,)
)
 Appellant,)
)
 v.) C.A. No. N11A-07-004 WCC
)
 JACK'S COUNTRY MAID DELI AND)
 UNEMPLOYMENT INSURANCE)
 APPEAL BOARD,)
)
 Appellees.)

Submitted: January 12, 2012
Decided: April 18, 2012

On Appellant/Employee's Appeal from the
Unemployment Insurance Appeal Board – **DENIED**

OPINION

Bradley A. Shores. 7 Gristmill Lane, Newark, DE 19711. *Pro se* Appellant.

Michael W. Modica, Esquire. 715 King Street, Suite 300, P.O. Box 437,
Wilmington, DE 19899. Attorney for Appellee Jack's Country Maid Deli.

CARPENTER, J.

Appellant Bradley A. Shores (“Shores”) worked at Appellee Jack’s Country Maid Deli (“Jack’s”). Jack’s fired Shores after one day of particularly egregious misconduct, during which Shores repeatedly left his station at the service area without permission and used his cell phone on the job. Shores says he was sick on the day of his alleged misconduct and that he didn’t realize he needed to ask to leave the service area to use the restroom. Nevertheless, the Unemployment Insurance Appeal Board (UIAB) found that Jack’s terminated Shores for just cause. Upon consideration of Shores’ appeal from the UIAB, the decision of the UIAB is hereby AFFIRMED.

BACKGROUND

Shores worked as a deli clerk for Jack’s for just over one year.¹ Several incidents of poor behavior marked Shores’ employment at the deli. First, in November 2010, Shores—while not on duty—donned a Halloween mask and went to Jack’s to startle the employees who were closing the deli.² This conduct was particularly troublesome since the store had been previously robbed. The deli’s manager verbally reprimanded Shores for his behavior but issued no written warnings.³ The next month, a customer spotted Shores making what the customer thought may have been a suspicious transaction in the deli parking lot while on the

¹ R. 56.

² R. 33-34.

³ R. 34.

job.⁴ Again, one of Shores' supervisors warned Shores that his behavior was inappropriate but did not write him up.⁵

Shores' final transgression, and the one that led to his dismissal, took place on February 19, 2011. On that day, Shores was responsible for fulfilling customer orders in the serving area of the deli. At the time, Shores was recovering from bronchitis and was still symptomatic.⁶ Throughout his shift, Shores would leave his station in the service area to go to the restroom to clear his throat, often without first fulfilling the customer orders for which he was responsible.⁷ In addition, Shores left his work station on at least four occasions to use his cell phone that day.⁸

Jack's terminated Shores' employment as soon as the store manager was made aware of the February 19 incidents.⁹ The Claims Deputy denied Shores unemployment benefits but that decision was reversed on appeal by the Appeals Referee.¹⁰ Jack's appealed, and the UIAB subsequently reversed the Appeals Referee, finding Shores disqualified from the receipt of unemployment benefits. Shores timely appealed the UIAB's decision to this Court.

⁴ R. 28.

⁵ R. 28-29.

⁶ R. 59.

⁷ R. 52, 39, 30.

⁸ R. 53-54.

⁹ R. 54.

¹⁰ See R. 15 (finding Shores was given permission to go to the restroom and noting that "since neither of the employer witnesses were present on the job that day, their testimony is considered hearsay").

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. 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. The Court also evaluates the record to verify that the UIAB's conclusions are free from legal error.¹¹ Substantial evidence is evidence from which an agency could fairly and reasonably reach the conclusion that it did.¹² The Court will uphold a discretionary decision of the UIAB unless it finds that there has been an abuse of discretion.¹³ 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 the circumstances, and has ignored recognized rules of law or practice so as to produce injustice."¹⁴

DISCUSSION

The issue before the Court is whether the UIAB erred in ruling that Shores' behavior and conduct gave Jack's "just cause" to terminate his employment. Just cause is defined as "a willful or wanton act or pattern of conduct in violation of

¹¹ *Unemployment Ins. Appeal Bd. of Dept. of Labor v. Duncan*, 337 A.2d 308, 309 (Del. 1975).

¹² *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).

¹³ *Funk v. Unemployment Ins. Appeal Bd.*, 591 A.2d 222, 225 (Del. 1991).

¹⁴ *PAL of Wilmington v. Graham*, 2008 WL 2582986, at *4 (Del. Super. June 18, 2008).

the employer's interest, the employee's duties, or the employee's expected standard of conduct."¹⁵ Willful or wanton conduct is evidenced by conscious action or reckless indifference leading to a deviation from acceptable workplace performance.¹⁶ 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.¹⁷

An employee's expected standard of conduct is relevant in determining whether the actions of the employee constitute just cause for dismissal.¹⁸ The Court uses a two-prong test to determine whether an employee's termination for failing to follow his employer's policy constitutes just cause: first, the Court asks whether a policy existed, and if so, what conduct was prohibited under the policy.¹⁹ Second, the Court determines whether and how the employee was apprised of the policy.²⁰ Knowledge of a company policy can be established by evidence of a written policy or by previous warning of objectionable conduct.²¹

¹⁵ *Smoke v. Coventry Health Care*, 2011 WL 2750711, at *2 (Del. Super. July 13, 2011).

¹⁶ *Dexter v. Purdue Farms*, 2010 WL 5556178, at *2 (Del. Super. Dec. 30, 2010).

¹⁷ *Id.*

¹⁸ *Weaver v. Employment Sec. Comm'n*, 274 A.2d 446, 447 (Del. Super. 1971).

¹⁹ *Dexter*, 2010 WL 5556178, at *2.

²⁰ *Id.*

²¹ *Id.*

Two policies are alleged to have existed and been breached in this case.²² The first relates to the conditions under which employees may leave the service area while on the job, and the second relates to employees' use of cell phones at work. Because Jack's presented no written policy of its expectations of employees, such as an employee handbook, it appears to the Court that Jack's propagates its policies verbally.²³ Thus, the Court will next discuss whether there were verbal policies regarding leaving the service area and cell phone use at Jack's, whether and how Shores was made aware of these policies, and whether Shores' behavior in February 2011 violated these policies.

1. *Policy on Leaving the Service Area*

Neither Jack's nor Shores denies that Shores left the customer service area multiple times on the evening of February 19. What the parties dispute is the deli's policy on employees leaving the service area. John Constantini, the manager for Jack's, told the Appeals Referee that Jack's employees are not permitted to leave the service area unless they get permission, noting that employees must either let their supervisor know that they're leaving the service

²² To the extent Jack's argues Shores' November and December incidents as grounds for his dismissal, the Court agrees with the Appeals Referee that on those occasions Shores acted with poor judgment but not with intentional disregard for acceptable workplace performance. As such, those incidents did not give Jack's just cause for terminating Shores. R. 15.

²³ R. 26, 52. Written policies are not necessary to show an employee was aware of an employer's expectations. *Irvin v. Mountaire Farms of Delmarva*, 2011 WL 2360362, at *2 (Del. Super. May 26, 2011).

area or use their paid break time.²⁴ Jack’s policy was confirmed by the testimony of Ashley Snyder, Shores’ supervisor on February 19, who said that she did not give Shores “permission” to leave the service area before he fulfilled his sandwich orders.²⁵ While clear and carefully worded written policies provided to employees is preferred and encouraged, on the basis of the deli manager’s and Snyder’s testimony, the Court finds the UIAB had sufficient evidence to find that Jack’s policy required employees to ask permission or at least to advise their supervisor when they were leaving their assigned area.

Whether Shores knew about this policy is not as clear. Constantini told the UIAB that Jack’s is generous in giving employees breaks.²⁶ An employee could understandably misconstrue this “generosity” as permission freely given, rendering any request to leave the service area to use the restroom a useless formality. Further, when the UIAB asked Constantini if he had warned Shores about the consequences of leaving the service area without permission, Constantini gave a fairly broad, vague affirmation that seemed to relate more to

²⁴ R. 33.

²⁵ R. 58.

²⁶ R. 54.

the discussions Constantini had with Shores after the November and December incidents than the February incident.²⁷

But the key question here is whether Jack’s clearly communicated to Shores what was expected of him, and ultimately, the fact that Snyder told Shores “numerous times” that he had to work “instead of continuously walking off the [service area] and not waiting on customers” is convincing evidence that Shores was aware of the deli’s policy.²⁸ To a large degree this is just plain common sense. Shores’ job, at least on that day, was to make sandwiches for customers. If he was not in the service area, someone else would need to cover his station to make sandwiches for customers as they arrived. If he just leaves, the area is uncovered and the employer’s primary business is lost.

The Court appreciates that Shores, if his symptoms were as he testified them to be, was between a bit of a rock and a hard place at Jack’s. On the one hand, he could not clear his throat in the service area; on the other hand, Jack’s was so busy that he could barely find time between orders to go to the restroom. While Snyder might have known Shores was recovering from bronchitis, nothing in the evidence

²⁷ R. 53. (“Our order of command is that [Ashley Snyder] is the shift manager [and] any problems that she would have with Mr. Shores . . . would be given to the store manager and the store manager discusses those things and we collectively put it together. To answer your question, yes Mr. Shores was discussed and warned about these things, these happenings that he’s doing here on several occasions.” In November 2010 [Shores] arrived at the store wearing a Halloween mask and proceeded to—[interrupted by UIAB].”).

²⁸ R. 52, 54. See *Irvin v. Mountaire Farms of Delmarva*, 2011 WL 2360362, at *2 (Del. Super. May 26, 2011) (“A key question is whether the employer clearly communicated to the employee what was expected of him or her.”)

suggests that Shores communicated his predicament to her and sought an accommodation for his condition. Rather, he appears to have chosen to break what he knew to be the standard of conduct for Jack's employees and abscond from the service area whenever he needed to. For this reason, the Court finds that there was substantial evidence to support the UIAB's conclusion that Jack's fired Shores for just cause on the basis of his frequent, unexcused absences from his work area on February 19.

2. *Policy on Cell Phone Use*

The UIAB heard testimony that Jack's prohibits employees from keeping their cell phones on their persons; employees must turn off their cell phones and keep them in their purse or car while they're working.²⁹ A natural extension of this policy is that employees cannot use their cell phones to send text messages on the job.³⁰ Shores testified that he understood this policy.³¹ Nonetheless, he admitted to using his cell phone on February 19, and a Jack's surveillance tape confirms the same.³²

This is a straightforward case: Jack's clearly had a policy against employees using cell phones on the job and Shores knowingly and willingly violated this

²⁹ R. 38.

³⁰ R. 54.

³¹ R. 38.

³² R. 36, 23.

policy. His reasons for doing so are inconsequential. While Shores alluded that other Jack's employees use their cell phones at work, he did not testify that any of his supervisors ever made an exception to the policy for him.³³ The fact that Shores used his cell phone on the job on February 19, in conjunction with the misconduct previously discussed, gave Jack's just cause to terminate Shores' employment.

CONCLUSION

Bradley Shores' conduct at Jack's Country Maid Deli on February 19 was more than the mere product of inadvertence.³⁴ The Court has reviewed the record and finds that the UIAB based its conclusion on substantial evidence of Shores' awareness of, and disregard for, Jack's Country Maid Deli's expectations of its employees. 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.

³³ See R. 38 (Mr. Shores: "I understand the policy but I would just ask why would everybody else be doing it?").

³⁴ See *Irvin v. Mountaire Farms of Delmarva*, 2011 WL 2360362, at *2 (Del. Super. May 26, 2011) ("To satisfy the just cause standard, courts require more than mere inadvertence on the part on the employee.").