

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

IRVING THOMPCKINS JR., )

Appellant, )

v. )

C.A. No. 07A-07-001WCC

FRANCISCAN ELDER CARE )

and the UNEMPLOYMENT )

INSURANCE APPEAL BOARD )

Appellees.

Submitted: March 17, 2008

Decided: June 27, 2008

**MEMORANDUM OPINION**

**Appeal from Unemployment Insurance Appeal Board. AFFIRMED.**

Irving Thompkins, Jr., 446 Kemper Drive, Newark, Delaware 19702, *Pro Se*  
Appellant.

Mary Page Bailey, Esquire, Department of Justice, 820 N. French Street,  
Wilmington, Delaware 19801. Counsel for Unemployment Insurance Appeal  
Board.

Jeffrey K Martin, Esquire, 1508 Pennsylvania Avenue, Wilmington, Delaware  
19806. Counsel for Franciscan Elder Care.

**CARPENTER, J.**

## Introduction

Before this Court is Irving Thompkins' ("Appellant") appeal from the Department of Labor, Division of Unemployment Insurance Appeal Board's ("Board") decision, where it found that Mr. Thompkins was discharged by his employer, Franciscan Elder Care, ("Appellee") for just cause. Upon review of the record in this matter, the Court finds the Board's decision is supported by substantial evidence and is therefore AFFIRMED.

## Facts

Appellant was an employee of Franciscan Elder Care for approximately ten and a half years. During that time period Appellant had a substantial record for tardiness and absenteeism, and was issued several warnings and suspensions. Appellant maintains his frequent absences were due to his wife's medical condition. On December 28, 2006, Appellant was suspended for two days and was warned that further violations of attendance policies would result in his termination. Appellee claims Appellant continued to violate company policies and on March 27, 2007 Appellant was given the option to resign or be terminated. He chose to resign.

As a consequence of his resignation, Appellant sought unemployment benefits through the Division of Unemployment Insurance, which found him ineligible due to the fact that Appellant had voluntarily resigned. Appellant appealed the decision

and the Referee determined that Appellant had been constructively discharged from his position, as opposed to voluntarily resigning, but that the discharge was based on Appellant's wilful and wanton misconduct, rendering him ineligible for unemployment benefits pursuant to 19 Del. C. §3314(2).<sup>1</sup>

Appellant appealed the Referee's decision and on September 5, 2007 the Board held a hearing to address the appeal. The Appellant and Ann Rutkowski, Appellee's representative, appeared and testified. In its decision the Board affirmed the Referee's decision denying unemployment benefits to Appellant, finding that he was discharged from his employment for just cause.<sup>2</sup> Subsequently, Appellant filed the instant appeal, to which Appellee has responded. The following represents the Court's decision on the matter.

#### Standard of Review

This Court's role in reviewing an appeal from the Board is limited to an evaluation of the record, in the light most favorable to the prevailing party, to determine if it includes substantial evidence that a reasonable mind accepts as

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<sup>1</sup>Referee's Decision at 2. *See* 19 Del. C. §3314(2). "An individual shall be disqualified for benefits: For the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount."

<sup>2</sup>Decision of the Unemployment Insurance Appeal Board at 2.

adequate support for the conclusion and is free from legal error.<sup>3</sup> Therefore, the Court does not address issues of credibility or independently weigh the evidence presented to the Board.<sup>4</sup> If the record supports the Board's findings, the Court must accept those findings even though the Court might reach a different conclusion on the facts presented.<sup>5</sup>

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### Discussion

The question before this Court is whether the Board had substantial evidence to determine that Appellant acted wilfully and wantonly when he continually violated Appellee's attendance policies, providing his employer "just cause" for his termination, and excluding him from eligibility to receive employment benefits. The Court finds that the answer to this question is yes and that the Board had substantial evidence to reach its conclusion.

At the Board's hearing, Appellee had the burden of proving by a preponderance of the evidence that Appellant was terminated for just cause. Just cause is a "wilful

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<sup>3</sup>*General Motors Corp. v. Freeman*, 164 A.2d 686, 689 (Del. 1960) ("The position of the Superior Court. . . on appeal is to determine only whether or not there was substantial evidence to support the findings of the Board. If there was, these findings must be affirmed.").

<sup>4</sup>*Michael A. Sinclair, Inc. v. Riley*, 2004 WL 1731140, at \*2 (citing *Unemploy. Ins. Appeal Bd. v. Div. of Unemploy. Ins.*, 803 A.2d 931, 937 (Del. 2002) ("Questions of credibility are exclusively within the province of the Board which heard the evidence. As an appellate court, it [is] not within the province of the Superior Court to weigh the evidence, determine questions of credibility or make its own factual findings.")).

<sup>5</sup>*H & H Poultry Co. v. Whaley*, 408 A.2d 289, 291 (Del. 1979).

or wanton act or pattern of conduct in violation of the employer's interest, the employee's duties, or the employer's expected standard of conduct."<sup>6</sup> This includes conduct that is a conscious act by the claimant, or "reckless indifference leading to a deviation from established and acceptable workplace performance."<sup>7</sup> Additionally, "just cause" exists if an employee violated a company rule, especially if he was on notice of the rule.<sup>8</sup>

First, the Board agreed with the Referee's determination that Appellant was discharged from his employment as it is defined under the statute. Appellant was told on his last day of work that he was going to be "let go," but was given the choice of resigning as opposed to being terminated, and Appellant chose the former, not wanting to tarnish his employment history with a termination. The Referee found that because Appellant would have been discharged had he not resigned, he was in effect "constructively discharged" from his position, triggering the application of 19 Del. C. 3314(2). The Board in turn treated Appellant's forced resignation as a discharge. The Court agrees with this finding.

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<sup>6</sup>*Majaya v. Sojourners' Place* 2003 WL 21350542 (Del. Super. June 6, 2003)(quoting *Avon Prods., Inc. v. Wilson*, 513 A.2d 1315 (Del. 1986).

<sup>7</sup>*MRPC Financial Management LLC v. Carter*, 2003 WL 21517977 (Del. Super. June 20, 2003).

<sup>8</sup>*Mosley v. Initial Sec.*, 2002 WL 31236207 at \*2 (Del. Super. Oct. 2, 2002).

Second, Appellant testified before the Appeals Referee that he knew he was in danger of losing his job if he continued violating the attendance policies.

THE REFEREE: Mr. Thompkins, you did receive the discipline in the suspension back in December of '06 for excessive tardiness and other attendance issues, is that correct?

IRVING THOMPCKINS: Yes.

THE REFEREE: Yes. And you knew that if you continued to be late for work and miss work with an unexcused absence that eventually you were going to be terminated from your employment?

IRVING THOMPCKINS: Yes but I had a problem. My wife had sugar real bad and had to go to the hospital with her. . .<sup>9</sup>

This testimony reflects that the Appellant was on notice that this pattern of conduct was in violation of his employer's interest and his failure to modify this behavior would result in his termination. While the Court is sympathetic to Appellant's proffered reason for his absences, it appears that there was a gradual disciplinary effort by the Appellee to raise its concerns with the Appellant, which continued to be ignored by him. While appreciative of the Appellant's wife's medical condition, the unique nature of Franciscan Elder Care's work requires it to have a

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<sup>9</sup>Tr. of Hrn'g. before Div. of Unemployment Insurance Appeals at 9.

reliable workforce, and the Appellant's absences left them with no alternative other than termination. Therefore, after examining the record below, the Court finds that there was substantial evidence before the Board to show that Appellant was discharged from his employment for just cause, and the Board's decision is affirmed.

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Conclusion

For the foregoing reasons, the decision of the Board is AFFIRMED.

IT IS SO ORDERED.

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Judge William C. Carpenter, Jr.