

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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RE: *Colleen McDaniel v. God's Way to Recovery, Inc. & Unemployment
Insurance Appeal Bd.,
C.A. No. S13A-10-002 RFS*

Date Submitted: March 12, 2014
Date Decided: June 16, 2014

Dear Ms. McDaniel and Mr. Primos,

Before the Court is the appeal of Colleen McDaniel (“McDaniel”) of a decision rendered against her by the Unemployment Insurance Appeal Board (the “Board”) regarding her termination by her former employer, God’s Way to Recovery, Inc. (“GWTR”). For the reasons explained below, the Board’s decision is **AFFIRMED**.

FACTS & PROCEDURAL BACKGROUND

McDaniel was employed by GWTR from April 18, 2010 until her termination on April 29, 2013. At the time of her termination, McDaniel served as a full-time manager of GWTR's retail store in Georgetown, DE. She earned \$13.00 per hour.

Subsequent to her termination, McDaniel filed for unemployment insurance benefits with the Delaware Department of Labor's Division of Unemployment Insurance. The Claims Deputy/Agency Representative for the Division found that GWTR met its burden of showing just cause for McDaniel's discharge, and therefore found her disqualified from receiving unemployment insurance benefits.

McDaniel filed a timely appeal to an Appeals Referee. The Appeals Referee found as matters of fact that McDaniel had been discharged from employment with GWTR for theft, absenteeism, and violation of company policy. Specifically, GWTR claimed that McDaniel sold GWTR's scrap metal to a scrap yard and pocketed the money, and gave away GWTR's merchandise to a friend, McDaniel stole a television and personnel files belonging to GWTR after her termination, and McDaniel frequently missed work or did not work her full shift.

These accusations were based on reports from other GWTR employees, primarily Cinthia Ortega ("Ortega"), who worked with McDaniel in the Georgetown store and, allegedly, covered for McDaniel when McDaniel was not present at the

store during work hours.¹ There was also an anonymous letter postdated on April 22, 2013 and addressed to Carrie Wood (“Wood”), the co-owner of GWTR, which accused McDaniel of giving away free or discounted merchandise to owners of a Mexican restaurant in exchange for free liquor at the restaurant.

Before the Appeals Referee, McDaniel denied all of these allegations, except the incident involving the scrap metal. She claimed that she disposed of the metal because she was told that the Georgetown store’s warehouse was in disarray, and because she used her personal vehicle to do so, she kept the proceeds to reimburse herself for the fuel cost of the trip. She also claimed that GWTR did not have a policy regarding the disposition of scrap metal.

The Appeals Referee concluded as matters of law that GWTR’s only evidence of McDaniel’s supposed theft from the Georgetown store and warehouse and impermissible absenteeism was conjecture, mere suspicion, hearsay statements, and the uncorroborated testimony of Ortega, who admitted to lying about the same events.

¹ Ortega stated in a letter dated May 1, 2013 that she witnessed McDaniel on various occasions permit her friend to take merchantable items from both the Georgetown store and its adjoining warehouse. Ortega also claimed that she witnessed the scrap metal incident and McDaniel’s alleged taking of the personnel files. She further claimed that after McDaniel’s termination, Ortega noticed that a television in the employee break room was missing. The television had been placed there by McDaniel on a prior occasion. Upon noticing it missing, Ortega was informed that McDaniel asked Jesse Davis, a GWTR volunteer, and someone named LaVaughn Jones, to place the television in McDaniel’s truck.

According to Ortega, after McDaniel’s discharge, McDaniel demonstrated animosity towards Ortega. McDaniel denies these allegations.

Regarding McDaniel's supposed violation of a company policy, GWTR pointed to no such policy. Thus, the Appeals Referee held that GWTR failed to establish by a preponderance of credible evidence that McDaniel was terminated for just cause, and therefore reversed the Claims Deputy/Agency Representative's decision and found McDaniel not disqualified from receiving unemployment insurance benefits.

GWTR filed a timely appeal to the Board. In its opinion, the Board summarized the additional evidence presented before it, which included a copy of GWTR's employment policy. GWTR claimed that the scrap metal incident violated an earlier version of the policy. McDaniel testified that she was told at the time of her discharge that she was being terminated for selling scrap metal and leaving work early. She believed that she was authorized to dispose of the scrap due to a warning directing her to tidy up the Georgetown store's warehouse. McDaniel understood that the scrap was the property of GWTR, but believed that she was disposing of junk. McDaniel further believed that she could keep the proceeds from the sale because she used her personal vehicle to transport the scrap and the funds from the sale were *de minimus* (\$7-8). On cross-examination, she admitted that she never reported the sale of the scrap metal to her employer, and that she delivered, among other things, the proceeds from the scrap's sale to a police officer investigating complaints made by GWTR. McDaniel called a witness who, under GWTR's employ, would go to

GWTR's various stores and perform evaluations. This person stated, among other things, that all of GWTR's stores had issues involving scrap metal, that GWTR had no consistent policy for dealing with the scrap, and that in her experience, most stores have the scrap picked up and brought to GWTR's Milford store for disposal.

The Board stated that GWTR claimed that McDaniel was terminated for violating its employment policies regarding theft and absenteeism. The Board was satisfied that GWTR met its burden in establishing the existence of these policies and McDaniel's knowledge of these policies because GWTR presented two written policy manuals, which McDaniel had signed. Therefore, the sole question before the Board was whether a violation of these policies occurred.

The Board stated that GWTR's decision to terminate McDaniel seemed to be based on four separate bases: (1) her alleged absenteeism; (2) her alleged gifting of merchantable store items to her friend; (3) her alleged theft of a television and personnel files that belonged to GWTR; and (4) her alleged theft of GWTR's scrap metal. The Board concluded that GWTR's evidence as to the first, second, and third bases was irrelevant because none of these incidents formed any basis for McDaniel's termination. Wood testified that she was unaware of the issues relating to McDaniel's absenteeism and gifting of salable merchandise at the time of firing McDaniel. Additionally, the theft of the television occurred after McDaniel's

termination, and thus could not have been a basis for her termination. Therefore, the Board did not consider any evidence relating to these issues.²

This left the scrap metal incident as the only potential violation of an employment policy which would constitute just cause for McDaniel's termination. The Board concluded that the scrap metal incident violated certain of GWTR's policies. Specifically, GWTR had a policy that stated that all donations were GWTR's property. McDaniel was aware of this policy. Thus, the scrap metal was GWTR's property. Further, although McDaniel claimed that she sold the scrap pursuant to GWTR's mandate to tidy up the Georgetown store's warehouse, the Board noted that McDaniel did not simply dispose of the scrap. Rather, she transported it, sold it, and kept the proceeds. A separate GWTR policy required all cash reimbursements to be pre-approved by designated management. McDaniel, however, did not seek authorization to keep the proceeds, thus constituting a violation of that policy. Based on this, the Board reversed the Appeals Referee's decision and found McDaniel disqualified from the receipt of unemployment benefits. This appeal followed.

² Like the Appeals Referee, the Board concluded that even if evidence on those issues was relevant, GWTR did not establish by a preponderance that absenteeism or gifting of salable merchandise by McDaniel occurred.

STANDARD OF REVIEW

When reviewing appeals from the Board, this Court examines only the record upon which the Board relied in making its decision.³ This Court only determines whether substantial evidence supported the Board's decision, and whether the Board's decision lacked legal error.⁴ The requisite degree of evidence is only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁵ Evaluating the evidence, deciding credibility issues, and determining factual questions are not within this Court's purview.⁶ Ultimately, the Court only decides whether a sufficient basis supports the Board's decision.

ANALYSIS

Parties' Contentions

McDaniel contends that her termination was the result of much more than the scrap metal incident. She claims that the record clearly indicates GWTR's intention to terminate her for just cause in any manner possible in order to deny her unemployment insurance benefits. McDaniel claims that her firing, for which she

³ *Burgos v. Perdue Farms, Inc.*, 2011 WL 1487076, at *2 (Del. Super. Apr. 19, 2011).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

was not paid her accrued leave, starkly juxtaposes her good employment record with GWTR. She asserts that this whole ordeal stems from the anonymous letter, and that all circumstances surrounding the scrap metal incident were suspicious on GWTR's part. She also states that GWTR does not pay for unemployment insurance.

McDaniel states that throughout the proceedings below, she was unprepared, confused, and rushed. This caused her to miss the opportunity to explain GWTR's practices regarding employee reimbursements, and to question the witnesses about the scrap metal incident. She states that the incident constitutes a permissible reimbursement, not a "theft." Apparently, GWTR had a "pay-out policy" for expenditures like the scrap metal incident. The protocol was for the employee to turn in a receipt for the expenditure to GWTR, which McDaniel claims she did. Further, Ortega, who testified against her, stated that she indeed returned the receipt for the scrap metal. This receipt should have been included in the daily paperwork. Expenditures for personal vehicle use were usually capped at \$10. All reimbursements needed to be approved by the designated store manager, who would be the manager of the premises, and included in the daily paperwork.

McDaniel asserts that the Board's determination that GWTR's scrap metal constituted GWTR's "property" is incorrect. She claims that the scrap was a donation. However, she contends that the keeping the proceeds from its sale was a

permissible reimbursement for her following GWTR's directive to clean out the Georgetown store's warehouse. McDaniel also questions why GWTR would create an internal report regarding the incident and involve the police regarding the scrap metal incident, and yet only present the anonymous letter to her when initially confronting her. She also adds that she has not been charged for the scrap metal incident. McDaniel claims that all of the evidence points clearly to the fact that she was terminated because of the anonymous letter, making the scrap metal incident mere pretext.

GWTR responds that the Board's decision was supported by substantial evidence and free from legal error. Focusing on just the scrap metal incident, as the Board did, it is clear that McDaniel sold scrap metal which was GWTR's property and kept the proceeds without permission from her immediate supervisor, and that McDaniel was aware of all of GWTR's employment policies. GWTR asserts that this evidence more than survives the deferential standard by which this Court judges the Board's actions and supports the Board's conclusion that McDaniel committed a wilful and wanton act justifying her termination. Additionally, GWTR points to McDaniel's attempt in her Opening Brief to introduce additional evidence not included in the record, which this Court may not consider. GWTR also submits that the Board did not commit legal error.

McDaniel counters that GWTR fails to acknowledge its policy regarding employee-permitted reimbursements for use of a personal vehicle. McDaniel points out that GWTR also fails to address the fact that McDaniel handed in the receipt for the scrap metal and what happened to the receipt after McDaniel submitted it. McDaniel also reiterates that the evidence clearly shows that the scrap metal incident had nothing to do with her termination.

Discussion

The legal framework in a termination case involving violations of employment policies is clear:

Pursuant to 19 *Del. C.* § 3314 an employee is ineligible to receive unemployment benefits if he or she has been terminated for just cause. The term “just cause” denotes a wilful or wanton act in violation of either the employer’s interest, or the employee’s expected standard of conduct. Wilful or wanton conduct is “that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance.” In a termination case, the employer has the burden of proving just cause.

Violation of a reasonable company rule may constitute just cause for discharge if the employee is aware of the policy and the possible subsequent termination. This Court uses a two-step analysis to evaluate just cause: “1) whether a policy existed, and if so, what conduct was prohibited, and 2) whether the employee was apprised of the policy, and if so, how was he made aware.” Knowledge of a company policy may

be established by evidence of a written policy, such as an employer's handbook or by previous warnings of objectionable conduct.⁷

In this case, the Board discredited all of the violations alleged against McDaniel except for the scrap metal incident. The Board noted that GWTR's policy rendered all donations the property of GWTR; the scrap metal was GWTR's property; and McDaniel knew of this policy. Further, the Board noted GWTR's policy regarding employee reimbursements, and McDaniel's failure to comply with this policy. This evidence constituted the just cause for her termination.

GWTR's 2009 employment policy, which McDaniel agreed to by signing an Employee Handbook Agreement April 28, 2010,⁸ stated that "[a]ll donations are the property of God's Way Thrift Store. Any items taken for personal use is theft. Employees will be terminated and volunteers asked to leave and not return for theft."⁹ In a later section, the policy stated that "[o]ffenses that will result in immediate termination: . . . theft."¹⁰ GWTR's 2010 employment policy stated that "[a]ll cash reimbursements must be pre-approved by designated management. The following are

⁷ *Wilson v. Unemployment Ins. Appeal Bd.*, 2011 WL 3243366, at *2 (Del. Super. July 27, 2011) (citations omitted).

⁸ McDaniel signed this agreement using her married name. R. at 181.

⁹ R. at 174.

¹⁰ R. at 180.

identified, pre-approved reimbursements: *[d]ay labor[;] *[b]us fare[;] *[g]as for coverage at a different store[;] *[g]as for training”¹¹ McDaniel signed an acknowledgment to this policy on April 20, 2010, which stated that she understood that she was an at-will employee and that she would abide by the rules within the policy.¹²

The Court finds that the record contains sufficient evidence that McDaniel did not follow the proper protocol for receiving a reimbursement for the scrap metal, and thus violated a policy of which she was aware. First, GWTR’s policy does not list gas for a personal vehicle used in cleaning out a store location as a pre-approved reimbursement. Second, even if McDaniel did return the receipt for the scrap metal, and excluding the issue that the whole concept of a receipt was not presented or addressed in the decision below, evidence exists that McDaniel did not follow the proper procedure for receiving a reimbursement. Ortega wrote about the scrap metal incident in a statement dated May 1, 2013, two days after McDaniel’s termination:

I observed [McDaniel] tell LaVaughn Jones to put the scrap metal in her truck. They brought the receipt back—along with LaVaughn’s ID—it was not put in [McDaniel’s] name. [McDaniel] told me that she was going

¹¹ R. at 161.

¹² McDaniel signed this disclaimer using her married name. R. at 168.

to put the money in “donation.” I checked the record the next day and there was no money in “donation.”¹³

Ortega touched on the incident further when testifying before the Appeals Referee:

Q: Ms. Ortega, did you ever notice . . . [McDaniel] handling any type of scrap metal?

A: Yes, sometimes when rusty metal was there they would put it away for scrap metal, but one time she did tell me I’m going to go sell these things and she told Yvonne, an employee, to put those things in her car and she told me that she was going to go sell them.

Q: Do you remember when this happened?

A: No.

Q: Okay. And do you know if she did sell them?

A: Yes, she did sell them because she came back with a yellow receipt and she left it in the front desk and I saw it and it caught my attention especially because it was not under her name.

Q: What usually happens when the store sells scrap metal?

A: Well for me that was the first time that I heard that it could be sold, but my understanding is that whatever money came out of it had to go to donation and that’s what she said, when I come back I’m going to put this money in donation.

Q: And do you know if the money was ever recorded in the donations?

¹³ R. at 18.

A: When I called the store I checked if that money had gone to donation and there wasn't any money in donations.¹⁴

Since a violation has been established, the question becomes whether the Board was entitled to focus on one specific employment violation committed by McDaniel which was supported by sufficient evidence, and conclude that the violation *alone* constituted just cause. The Court holds that it could.¹⁵

Lastly, the Court notes that, contrary to what McDaniel implies, this is not the type of situation where the scrap metal incident appeared out of thin air.¹⁶ The record contains two incident reports dated April 26, 2013, both filed by Wood. The first states that Wood “[r]eviewed anonymous letter stating that [McDaniel] was giving items to [r]estaurant [o]wner in exchange for alcohol. Met with [McDaniel] and had

¹⁴ R. at 74:16–25; 75:1–18.

¹⁵ When evidence creating just cause exists, the Board may focus on just that evidence in upholding an employment decision, excluding other evidence that may or may not also constitute just cause. *Cf. Butler v. Safe Check East, Inc.*, 2011 WL 2739504, at *2 (Del. July 14, 2011) (“We need not decide Butler’s second claim that the Board improperly considered the ‘apology’ e-mail *because, even without that letter, there was substantial evidence before the Board to support its decision that Butler was terminated for ‘just cause.’*”) (emphasis added)).

¹⁶ *Cf. Hundley v. Riverside Hosp.*, 1993 WL 542026, at *6–7 (Del. Super. Sept. 27, 1993). In *Hundley*, this Court distinguished the facts in that case from its opinion in *Hoskins v. Maryland Bank*, stating that “[i]n *Hoskins*, it was held error for the Board to rely on the claimant’s alleged use of profanity for ‘just cause’ because ‘no mention of insubordination or profane language was ever made until the . . . Board hearing.’” *Id.* at 7 (quoting and citing *Hoskins v. Maryland Bank*, C.A. No. 88A-AU-15, at 5 (Del. Super. Mar. 1, 1989) (Stiftel, J.)). In *Hoskins*, “[t]here had only been testimony and evidence presented as to the employee’s absenteeism. In . . . [*Hundley*], there was testimony before the Referee . . . that [the e]mployee made the profane statement.” *Id.*

her read letter. She said it was totally false.”¹⁷ The report states that the police were not involved and money was not stolen. The next report further describes conduct involving McDaniel:

Liz Cooley (manager from Rehoboth store) called [Wood] and stated that she heard from [McDaniel] re: letter. [Cooley] admitted she heard from [Ortega] on 2 separate occasions regarding [McDaniel] giving items from store to friend – Cecilia (restaurant owner). Also that [McDaniel] had taken scrap metal from warehouse and did not put money back into store sales. Police were contacted. Interview of . . . Ortega and . . . Cooley. Determination made for . . . McDaniel to be let go from employment end of business day 4-29-13.¹⁸

A third report dated April 28, 2013 is dedicated completely to the scrap metal incident and states “[McDaniel] and LaVaughn went to scrap metal yard to cash in scrap metal from warehouse. Metal was processed in LaVaughn Jones’ name – Money was not put back into store sales.”¹⁹ The report states that the police were involved and money was stolen, with a notation in response to a request for details as to how much was stolen that reads “[s]crap metal – not sure of total amount.”²⁰ Thus, with the scrap metal incident mentioned in one of the April 26th reports, and being the sole

¹⁷ R. at 7.

¹⁸ R. at 9–10 (emphasis added).

¹⁹ R. at 11.

²⁰ *Id.*

subject of the April 28th report, for which the police were involved, the scrap metal incident played a role in McDaniel's termination.

Based on the foregoing, the Board's decision is **AFFIRMED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

Cc: Prothonotary

Judicial Case Manger

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