



DELAWARE

EMPLOYMENT LAW LETTER

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OFF-DUTY ACTIVITY

Hair today, gone tomorrow — but with unemployment benefits

by Lauren E. Moak

A new opinion from the Delaware Superior Court sheds light on when off-duty conduct justifies an employee's termination for purposes of denying unemployment benefits. Because Delaware is an at-will-employment state, you may terminate an employee for inappropriate off-duty conduct. However, to avoid payment of unemployment benefits, you must have "just cause" for the termination. The court's opinion clarifies that an employee's off-duty conduct must have a "nonspeculative impact" on the employer's business to constitute "just cause" for termination.

A hairy situation

Michael Christopher Salon employed Nicole Willey as its receptionist. According to the court, Willey engaged in a "heated and profane" argument with one of her coworkers, "Dottie." The argument occurred via text message during nonwork hours and stemmed from salon management confronting the women about allegedly sharing prescription medication with a coworker. The two employees exchanged heated comments, but Willey's text messages included threatening language, such as "Hope u aint at work 2mor. Ur gonna b sorry."

Following the employees' heated exchange, Dottie went to work and shared some of the text messages with her supervisor, John Przbylski, who in turn shared them with his supervisor, Betty Armstrong. Przbylski and Armstrong spoke with Willey and Dottie and then terminated Willey's employment. Willey later filed for unemployment benefits.

A claim for unemployment benefits is reviewed by several administrative levels of the Delaware Department of Labor before it is reviewed by a court. Benefits are denied only if the employer can show "just cause" for the termination decision. "Just cause" may exist when an employee engages in "a willful or wanton act in violation of the employer's interest."

Willey's claim was reviewed first by a claims deputy and later by an appeals referee, both of whom denied benefits. The appeals referee found that the salon terminated Willey for just cause based on her frequent tardiness and harassment of other employees via text message. Willey appealed to the Unemployment Insurance Appeals Board (UIAB), which reviewed the evidence and concluded that the salon didn't have just cause to terminate her employment. That's because it failed to present sufficient evidence showing that Willey's conduct had an *actual* detrimental effect on any of its interests as an employer. The salon appealed the UIAB's decision to the superior court.

Hair me out

On appeal, the salon raised several issues, including whether there was a sufficient nexus between Willey's off-duty conduct and her workplace performance. In analyzing whether Willey's conduct was sufficiently detrimental to the salon to constitute just cause for termination, the court considered several factors.

First, the court noted that neither Przbyski nor Armstrong found Willey's text messages so threatening that they called the police or undertook any measures to keep her out of the salon. Thus, the court concluded that the threats didn't affect the employer in a substantive way.

Second, the court considered the employer's past practices. Willey testified before the UIAB that the salon had a general policy of allowing employees to work their differences out without resorting to supervisors. She bolstered her position by noting that she and Dottie had engaged in a previous off-duty argument several months before her termination. In that case, they resolved their dispute the next day at work and were able to continue working together successfully. The court emphasized that there was no reason to doubt that the same outcome would result after this argument. Importantly, the text message argument "took place outside of work, and had yet to manifest itself within the workplace or affect job performance." *Michael Christopher Designs v. Nicole Willey and Unemployment Insurance Appeal Board*, C.A. No. 09A-12-JOH (June 8, 2011).

Bottom line

While you may terminate an employee for her off-duty conduct, you may still be liable for unemployment benefits if there isn't a sufficient nexus between her off-duty conduct and her workplace performance. Therefore, you should think twice before wading into petty employee squabbles. To avoid finding yourself on the hook for unemployment benefits, you should

consider whether an employee's off-duty conduct actually affects your business interests.

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