SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A 3267-76

CAROL DEMECH,	:	
Appellant,	:	
vs.	:	Civil Action
BOARD OF REVIEW, DEPARTMENT OF LABOR AND INDUSTRY, and THE GREAT ATLANTIC and PACIFIC TEA COMPANY,	:	Appeal from decision of the Board of Review, Department of Labor and Industry, Docket No. 101,026-C-R
Respondents.	:	

APPELLANT'S BRIEF

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On The Brief

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PROCEDURAL HISTORY

Plaintiff-appellant filed a claim for unemployment benefits on September 17, 1965. She was denied unemployment benefits in an initial determination by the Division of Unemployment and Disability Insurance, of the Department of Labor and Industry, in a decision mailed on October 1, 1976. This decision held that the claimant was disqualified for the the receipt of benefits from August 1, 1976 through September 11, 1976 on the ground that she was discharged for misconduct connected with her work. She was also held liable to refund the sum of $492.00, received as benefits during this period. Plaintiff-appellant filed a timely appeal.

The Appeal Tribunal in a decision dated January 13, 1977 (Aa 1), affirmed the determination of the Deputy on the grounds that the plaintiff-appellant was discharged due to misconduct under N.J.S.A. 43:21-5(b). Ms. Demech appeared pro se at this proceeding. An appeal was filed with the Board of Review, and on March 1, 1977, the Board affirmed the decision of the Appeal Tribunal (Aa 2).

The plaintiff-appellant subsequently filed this appeal with the Superior Court pro se. After filing an initial appellant's brief, Ms. Demech sought the assistance of the Legal Aid Society of Mercer County to write a reply brief to the brief of the respondent (A & P Company). To satisfy time restrictions, we immediately did this. Thereafter, and in an effort to remedy the many procedural and substantive shortcomings in the plaintiff-appellant's brief, and with the consent of opposing counsel (Aa3,4,5), we prepared this substitute brief and appendix.

STATEMENT OF FACTS

Plaintiff-appellant, Carol Demech, was employed by the A & P Company as a meat wrapper and deli clerk for the nine month period preceding and ending on her termination on August 4, 1976. (T-3,4). She was working at the Mount Holly store for the two week period prior to termination. (T-4).

Ms. Demech testified that after working at the Mount Holly store for about one trouble-free week she became the unwilling subject of verbal and sexual abuse and harassment by a store butcher, Al Hahn (referred to as Hond in the transcript). (T-8). Butcher Hahn would repeatedly make obscene and abusive suggestions and comments, which Ms. Demech, for an impressively long period of time and to her credit, simply ignored. (T-8). She also informed the deli manager and the assistant store manager of the difficult situation in which she found herself, and received no assistance or support whatsoever. (T-8,9). Ms. Demech further testified that there were several witnesses to the abusive remarks made by butcher Hahn, but that she did not know their names. (T-8,9). Discussing her unfortunate circumstance with the Mount Holly store manager, Mr. Nicholas Martell, was seen as futile because he was a rather passive observer to all that had transpired. (T-9). Martell denied this. (T-10).

As a consequence of Hahn's continuing harassment and abuse, and unable to secure assistance from every quarter to which she turned, Ms. Demech in response to yet another series of obscenities from butcher Hahn, threw a roast beef at her tormentor striking him about the shoulder blades. (T 5,8,9).

Nicholas Martell, the store manager, testified that he discussed the beef-throwing incident with other employees in the store, and that no one was aware of the harassment and abuse as testified to by Ms. Demech (T-10). Martell further stated that he had never received any complaints from the approximately 40 to 55 women employed at the Mount Holly store. (T-10,11). Martell's entire testimony was given while the subject was not under oath. (T-10).

Ms. Demech was suspended from work pending further investigation on August 2, 1976. (T-4,5,6). On August 4, 1976 she was informed by Mr. Dailey, the A & P Personnel Director, that she was terminated (T-16,17). On August 5, 1976, Assistant Personnel Manager James Varian was sent to the Mount Holly store to investigate the circumstances respecting the incident of August 2, 1978. His investigation was limited to conversations with several store employees all of whom denied any knowledge of the abuse and harassment suffered by Ms. Demech. (T-15). Like the testimony of witness Martell, that of witness Varian was based exclusively upon second-hand and after-the-incident investigations. (T-5,12,13).

Although Mr. Martell testified that he "would have loved to have had [Hahn] here, "there was no effort on the part of the appeals examiner to secure the latter's presence or testimony at the hearing. (T-22).

POINT I.

THE DECISION THAT PLAINTIFF-APPELLANT WAS TERMINATED DUE TO MISCONDUCT UNDER N.J.S.A. 43:21-5(b) IS BASED SOLELY ON HEARSAY EVIDENCE AND THUS CANNOT BE THE BASIS FOR AN ADMINISTRATIVE DECISION.

The record below clearly discloses that the findings of the Appeal Tribunal and the Board of Review, far from being reached on sufficient credible and reasonable evidence, were reached exclusively on hearsay testimony. The testimony of Nicholas Martell, the principle witness for the employer, was not even given under oath (T-10). Significantly, the testimony was also hearsay:

Ex.Q. Mr. Martell, were you in the store the day this happened, the incident of throwing the beef?

A. Yes, ma'am.

Ex.Q. And what - tell us exactly in your own words, what happened?

A. Well, on a normal tour of the store, I walk through different departments, from dairy to produce and meat. That particular time I just walked through the back meat room, it had just occurred and the meat men were all crowded --

Ex.Q. Right after it occurred?

A. Right after it occurred, and the meat men were all talking, discussing the truck driver, Al Hahn was bent over. A meat man was in back of him, another guy was talking to him. So I started to walk by and nobody -- so, I walked over and I asked him what happened and they explained the whole situation to me. (T-12,13).

The testimony of employer-witness James Varian is of similar suspect quality for his only contact with the incident at issue were the interviews he conducted several days later. (T-5,14,15).

The appeals examiner did not question witnesses to the incident of August 2, 1976 nor did she require that said parties present themselves for examination and the taking of testimony. In fact, it is generally unclear as to whether any eye-witnesses existed save for the plaintiff-appellant and the object of her wrath -- butcher Al Hahn. Such being the case, the appeal examiner acted improperly in conducting a hearing with the aforementioned shortcomings.

N.J.S.A. 43:21-6(f), Procedure, states in pertinent part:

> ...the conduct of hearings and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure....

Pursuant to this mandate, the Board of Review issued rules governing the conduct of all hearings. In N.J.A.C. 12:16-10.5(b) the Board rules that:

> Hearing officers may issue subpoenas to compel the attendance of witnesses ...may administer oaths, examine and cross-examine witnesses, and do such other acts as may be necessary for the hearing and determination of the issues involved.

N.J.A.C. 12:20-3.2, details the conduct of hearings in ruling that:

> (a) The proceedings shall be fair and impartial and shall be conducted in such a manner as may best be suited to determine the claimant's benefits rights....the parties...may examine

> or cross-examine witnesses...where a party is not represented by counsel, the tribunal shall give him every assistance that does not interfere with the impartial discharge of its official duties. The tribunal may examine each party or witnesses to such extent as it deems necessary....

Clearly, the appeals examiner did not meet her obligation respecting the requirement that she conduct the hearing "in such a manner as may be best suited to determine the claimant's benefits rights," Id., because of 1) her failure to secure and insist upon the direct testimony of employee-butcher Hahn when it appeared that neither of the employer's witnesses, Martell or Varian, had any personal knowledge of what transpired on August 2, 1976, and 2) her total acceptance of the latter hearsay testimony, unsubstantiated by more competent evidence, and in complete derogation of the only eye witness testimony proffered -- that of the appellant-plaintiff. Too, the fact that the plaintiff-appellant appeared pro se at her Appeal Tribunal hearing mandated that the above-noted rules of procedure be strictly adhered to, and the claimant be given "every assistance."

N.J.A.C. 12:20-3.3, Adjournment of Hearings, requires:

> (a) The chairman of the appeal tribunal shall use its best judgment as to when adjournments of hearings shall be granted in order to secure all facts that are necessary and to be fair to the parties.

This rule should have been applied when it became obvious that the respondent was without witnesses capable of giving competent testimony based on personal knowledge. In a similar case, Softexture Yarns v. Board of Review, 59 N.J. Super. 57 (App. Div. 1960), the court reversed and remanded

the decision of the Board because it did not inform the parties that its decision would not be based solely on the record of the Appeal Tribunal, but instead, that new testimony would be sought. Part of the problem as seen by the Appellate Division was that the Board did not invite the witnesses heard by the Appeal Tribunal to testify. The court concluded that when it became apparent that the employer "had not come prepared to give the Board its side of the story," the Board should have adjourned the hearing, and "advised Softexture to come back with what was required." Id. at 62-63. Pursuant to N.J.A.C. 12:20-4.1, the appeals examiner in the instant case should have done likewise.

In Krauss v. A.M. Karagheusian, 13 N.J. 447 (1953), the Appeal Tribunal and the Board of Review disagreed as to the claimant's reason for quitting his job. The former thought it was to accept a pension while the latter thought it was because of illness. The Board reversed the finding of ineligibility based solely on "plaintiff's uncorroborated word" that he quit due to illness. Id. at 454. The New Jersey Supreme Court then pronounced its policy respecting the production of necessary evidence. The Court took a balanced approach by stating that the "interested parties" should supply sufficient information to determine eligibility. Id. at 456. The Court went on to note the interest of a third party -- the State -- personified by the administrative body, empowered to make the basic determination:

> Plainly the statute casts upon the agency, as respects both original and appellate determination, the role actively to press the interested parties to produce all relevant proofs at their command and when necessary, independently to take steps to get the facts, as,

> for example, when the record made by the parties is unsatisfactory... or the agency in any case has reason to believe that additional facts obtained and made part of the record on its own initiative will contribute to the correct result. (Citations) Id. at 457, Softexture, supra., at 63.

The case at bar presents a perfect situation for the application of the above-noted principles. Competent witnesses were available to testify and to give direct testimony, but they were neither subpoenaed nor examined. Hearsay testimony was the exclusive testimony proffered by the employer's witnesses, and there existed no other competent employer-evidence upon which to base this hearsay. Finally, the eye-witness testimony of the appellant was completely disregarded in favor of baseless hearsay which was in large part not even given under oath (See Point III).

Several recent court decisions reaffirm the basic principles of law already stated. In Weston v. State, 60 N.J. 36 (1972), the plaintiff was denied a firearms purchaser identification card by the township police chief. This decision was affirmed by the County Court notwithstanding the fact that in testifying, the police chief "gave information not from personal knowledge, but by reading from a report of the investigation." Id. at 47. This report included only statements by third parties and centered upon characterizations and opinions about the idea of Weston carrying a gun. Only limited cross-examination was permitted at trial. Id. at 48. The Supreme Court concluded:

> ....It (is) plain that the case... rested entirely upon the hearsay reports given him by his investigations.... Id. at 50.

The court further noted that:

> Obviously, it is most difficult, if not impossible, for an applicant to meet damaging hearsay testimony of the kind presented...In justice, an adverse decision by the County Court should not rest on such a record. Id.

The similarity between Weston and the instant case is remarkably clear. The record clearly notes that Martell and Varian, the witnesses for the employer, possessed only and entirely hearsay knowledge based on statements provided by parties not present at the hearing and apparently not even present at the time of the incident on August 2, 1976. Surely the plaintiff-appellant "could not have been expected reasonably to overcome such faceless opposition." Id. at 52. Weston makes clear the principle that an administrative agency determination cannot rest upon evidence which the unsuccessful party was incapable of impeaching or rebutting. As the testimony of the employer's witnesses was totally hearsay, and no other witnesses appeared to testify for the employer, the plaintiff-appellant was effectively without the capability of impeaching or rebutting the damaging testimony. Only by requiring the presence and testimony of the other direct participant, butcher Al Hahn, could plaintiff-appellant have been afforded an opportunity to impeach or rebut.

In re Application of Howard Savings Bank, 143 N.J. Super 1 (App. Div. 1970) distinguishes between appellants who were completely denied the opportunity to cross-examine the damaging hearsay testimony, (Weston) and situations where appellant had been provided with full disclosure of the evidence and had "been afforded ample opportunity to test the disclosed evidence for trustworthiness and accuracy, but failed to do so." Id. at 7. By either standard the hearsay in this case should not

have been admitted -- and certainly not have been allowed to form the sole basis of the decision. Arguably, plaintiff-appellant was completely denied the opportunity to cross-examine the damaging hearsay evidence within the Weston matrix because in essence the "identity of those whose adverse views formed the foundation of the judgment against [her] was not disclosed." Howard, supra. at 8. Thus, although the hearsay declarants were presented to the plaintiff-appellant at the hearing, the former's sources for the hearsay statements were not clearly disclosed nor identified, and it was these reports which were ultimately used to deny her benefits. As the Supreme Court noted in In re Plainfield-Union Water Company, 11 N.J. 382 (1953):

> Cross-examination and rebuttal are basic elements of hearing essential to due process....Cross-examination is an indispensable instrument for assessing the evidential worth of assertions of fact or opinion; and it is basic in due process that the parties affected by testimony adduced with the accepted safeguards shall be afforded the opportunity of rebutting or qualifying the force of the testimonial assertions. It strikes at the very foundation of justice to obtain what purports to be factual information bearing upon the substance of the issues by consulting informed persons not brought into the inquiry. Essential justice would be a vain pursuit were not this the inexorable rule. Id. at 393. (emphasis added).

Although the appeals examiner did not consult with the sources of the proffered hearsay information, she effectively did so by admitting such uncorroborated and baseless testimony into evidence through the mouths of Martell and Varian.

Although the Weston "naked hearsay" standard would apparently apply to the instant case, because unsubstantiated, baseless and total hearsay was the source of the adverse testimony and of the appeals examiner's adverse decision, even by the standard promulgated in Howard would the hearsay be inadmissable. Thus, although Martell and Varian were presented to the plaintiff-appellant at the hearing, they were in effect "faceless opposition" as per Weston, for she was incapable of impeaching or rebutting their testimony -- based as it was on sources dehors the record, and who were never called by the appeals examiner to testify.

Finally, while true, according to N.J.S.A. 52:14B-10, and N.J.S.A. 43:21-6(f), supra, that:

> The parties shall not be bound by rules of evidence...All relevant evidence is admissible,

These statutes are clearly not open-ended. N.J.S.A. 52:14B-10(a) allows for the exclusion of evidence if the presiding officer:

> finds that its probative value is substantially out-weighed by the risk that its admission will either (i) necessitate undue consumption of time or (ii) create substantial danger of undue prejudice or confusion.

Surely the "substantial danger of undue prejudice" is absolute where said information is the only probative evidence contradicting the testimony of plaintiff-appellant. This is precisely the case before the court today. The Supreme Court in Weston capsulizes the general rule:

> In our State...the rule is that a fact finding or a legal determination cannot be based on hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may

> be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. (Citations omitted). Id. at 51.

Based on the above principle, the Court should find that the hearsay testimony proffered at the administrative hearing is inadmissable. Accordingly, the case should be reversed and remanded with instruction to properly and fully develop the facts.

POINT II.

THE UNSWORN TESTIMONY OF NICHOLAS MARTELL, THE PRINCIPLE WITNESS FOR THE EMPLOYER, SHOULD BE STRICKEN FROM THE RECORD, AND AS SUCH SHOULD FORM NO PART OF THE RECORD FOR REVIEW BECAUSE UNSWORN TESTIMONY IS INADMISSIBLE UNDER THE LAWS OF THE STATE OF NEW JERSEY.

Respondents' brief failed to address the salient issue in claimant's case. The determination by the Appeal Tribunal confirmed by the Board of Review, that claimant was disqualified for unemployment benefits due to misconduct was the result of a hearing that was conducted in violation of both the laws of the State of New Jersey, and the general principles of due process of law. Particularly, the principle witness for the employer, Nicholas Martell, was never administered the oath as mandated by the laws of the State of New Jersey (T-10). This action becomes even more violative of legal principles when consideration is given to the fact that the employer always bears the burden of proof in misconduct cases. New Jersey Interpretation Service Manual, MC-2 -- MC-8, June 3, 1958; See BR-471, 150.

Thus, in State v. Walton, 72 N.J. Super. 527 (Law Div. 1962) the court noted that "no one, including a child, can testify as a witness, whether a party or not, unless first administered an oath of affirmation." Id. at 535. Walton merely echoes the state of the law as earlier promulgated by the New Jersey Supreme Court in both Anderson v. Barnes, 1 N.J.L. [Reprint 235] (Sup. Ct. 1793) and Williamson v. Carroll, 16 N.J.L. 217 (Sup. Ct. 1837). In Anderson, a reversal was granted because the court had permitted one of the jurors to give evidence to his companion without being sworn as a witness. In Williamson, the Court held that "prima facie every

witness is to be sworn and all evidence is to be given under oath." Id. at 218. The Court further noted that "(T)he omission to swear the witness was not cured by the examination and cross-examination of him...." Id. at 219. The Court then stated that the witness ought to have been re-examined under oath, or his testimony should have been overruled. Id.

Although the above-noted cases did not involve the administrative context, the principles of law involved are undeniably suitable for application thereto. In Lowden v. Board of Review, 78 N.J. Super. 467 (1953) the court stated:

> Since the right to unemployment compensation benefits is purely statutory (R.S. 43:21-1 et seq.), the procedural aspects of the enforcement of such right are governed entirely and exclusively by the statute. Id. at 467.

As part of that statute, N.J.S.A. 43:21-6(f) states in pertinent part that:

> ...the conduct of hearings and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of the parties, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. (emphasis added).

Further, the Department of Labor and Industry, Division of Employment Security, of which the Board of Review is a part, has promulgated N.J.A.C. 12:20-3.2(a), entitled "Conduct of hearings," which states that [A]ll oral testimony shall be under oath or affirmation and shall be recorded and kept."

The last link in this logical chain is provided by Lowden, supra., the court therein notes that the:

> [R]ules and regulations adopted by administrative authorities pursuant to power delegated to them by the legislature have the force and effect of law. Id. at 470.

The principles to be gleaned from the above analysis are simple and clear: (1) that the principle witness for the employer, upon whom the burden rests to sustain a charge of misconduct, did not give testimony under oath or affirmation; (2) that such testimony is required to be given under such oath or affirmation by the laws of the State of New Jersey; (3) that the consequence of admitting such testimony is to conduct a hearing in violation of the laws of the State of New Jersey; (4) that to conduct a hearing in violation of the aforesaid laws is to violate the principle of due process of law; (5) that therefore the evidence and testimony proffered by the unsworn witness for the employer should be overruled and should not form part of the record of this case; and (6) that the substantial evidence standard cannot be met if the principle testimony used to formulate such substantial evidence is inadmissible.

POINT III.

THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE TO SUPPORT THE CONCLUSION OF THE BOARD OF REVIEW THAT PLAINTIFF-APPELLANT WAS DISCHARGED FOR MISCONDUCT CONNECTED WITH WORK.

The determination of the Board of Review clearly violates the legal-factual matrix as put forth by Beaunit Mills, Inc. v. Board of Review, 43 N.J. Super. 172 (App. Div. 1956), petition den. 23 N.J. 579 (1957). The Beaunit standard clearly requires more than a mere showing of "an incident," no matter what form it takes, to sustain a charge of misconduct. The act cannot be considered apart from its factual context, for to do so would make the requisite and mandatory finding of "wanton and willful disregard of the employer's interest," Id. at 183, an impossibility. Thus, in Beaunit, the court held that there was no misconduct when it was shown that there was an absence of evil intent or willful desire to injure the employer.

The same such absence must be held to exist in the instant case since the only eye-witness testimony was that of the plaintiff-appellant (T-7-9), and only her testimony could be used to determine the mental state affixed to her act. A finding of "wanton or willful disregard of the employer's interest" when the only credible testimony is in derogation of such a finding cannot be sustained. As the Board of Review itself has noted, a misconduct charge must be based on definite proof of a willful disregard of the employer's interests. BR-10882. Such "definite proof" is not evinced by a decision which discounts eye-witness testimony under oath in favor of the hearsay testimony of two witnesses, the principle one of whom did not give testimony under oath. The Board of Review failed

to heed its own precedential decision, BR-6650, holding that oral testimony is to be preferred to hearsay -- particularly so, we might add, when such hearsay is not given under oath. Clearly, therefore, the Board of Review misapplied the standard for disqualification for misconduct connected with work. N.J.S.A. 43:21-5(b). The Board's action becomes even more violative of legal principles when consideration is given to the fact that the employer bears the burden of proof in misconduct cases. New Jersey Interpretation Service Manual, MC-2 -- MC-B, June 3, 1958; BR-471; BR-150.

In re Application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976) holds that administrative decisions

> will be upheld where there is substantial evidence to support the factual findings rendered.... It is only where it can be said that, upon the record, the decision is arbitrary, capricious or unreasonable that reversal is warranted. Id. at 10.

The Court believed substantial evidence to be the proper standard, citing Parkview Village Asso. v. Borough of Collingswood, 62 N.J. 21 (1972). Parkview Village involved a decision of a county board of taxation, and was reversed and remanded in part because the decision was "not supported by substantial credible evidence on the whole record, allowing for agency expertise and evaluation of the credibility of witnesses." Id. at 34. The Court noted that the "substantial evidence" standard is and should be applied to determinations of administrative agencies generally. It is, therefore, the correct standard of review in this case respecting the decisions of the Appeal Tribunal and the Board of Review of the Department of Labor and Industry.

That this standard is not met here is patent. The only substantial evidence presented was that of the plaintiff-appellant indicating: 1) that the act of throwing the beef was the culmination of continued frustration due to the sexual harassment by Hahn; 2) that the act of throwing the beef was done under intense emotional pressure and passion, and without the aid of cool and reasoned thought; and 3) that therefore there was "no wanton or willful disregard of the employer's interest," nor evil intent or willful desire to injure the employer as required by law for a finding of misconduct connected with work under N.J.S.A. 43:21-5(b), Beaunit, supra., and the many decisions of the Board of Review, BR-10882, supra.

As noted earlier in our brief, the testimony of the employer's only witnesses, James Varian and Nicholas Martell, was entirely hearsay. That of the latter was also not given under oath. If, as Martell states (T-13), there were several other eyewitnesses to the incident, a determination based on "substantial evidence" would require that at least one of them, indeed the "victim" Mr. Hahn himself, should have appeared to substantiate the charge. This is particularly so when, as noted above, the burden of proof in misconduct cases cases is on the employer. Too, a determination based entirely upon hearsay evidence cannot, by any stretch of mind or imagination, be considered "substantial".

The foregoing principles being noted, it is difficult to discern how the Appeal Tribunal and Board of Review could have rejected the contention of the plaintiff-appellant that her action was taken in response to verbal and sexual abuse. The only eyewitness testifying at the hear-

ing was the plaintiff-appellant, and her allegations should have been afforded more weight and belief than those of the two non-witness hearsay declarants. In this context, BR-10882 and BR-6650, supra., clearly establish that the Board of Review's determination was not made upon "substantial evidence" nor with homage to its own past decisions. The court should therefore overturn the determination of the Board of Review.

CONCLUSION

As the testimony of the principle witness for the employer, Mr. Nicholas Martell, was not given under oath as required by the laws of the State of New Jersey, the Court should rule that evidence offered by him is inadmissible. The Court should further determine that the hearsay testimony proffered by the witnesses for the employer is insufficient to sustain the determination of the Appeal Tribunal and the Board of Review because such evidence should not have been admitted, nor could it be relied upon to provide the requisite foundation for a finding of "substantial evidence."

The Court should reverse and remand the decision below with instructions that an attempt be made to provide plaintiff-appellant with a meaningful hearing respecting her claim for unemployment benefits.

Respectfully submitted,

/s/ Richard Dana Krebs

Richard Dana Krebs
Attorney for Plaintiff-Appellant

CERTIFICATION OF SERVICE

I hereby certify that I have served two copies of the attached brief and appendix of Appellant, Carol Demech, on Respondent, A & P and Respondent, Board of Review, Department of Labor and Industry, by first class mail, return receipt requested, to the addresses listed below.

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APPEAL TRIBUNAL

State of New Jersey
Department of Labor and Industry
DIVISION OF
UNEMPLOYMENT AND DISABILITY INSURANCE

IN THE MATTER OF: Carol A. Demech
605 Ohio Avenue
Trenton, New Jersey
08638

S. S. NO. 136-40-3135
DATE OF CLAIM: September 17, 1975
EMPLOYER: A & P

DECISION

The claimant appealed on October 8, 1976 from a determination of the Deputy, mailed October 1, 1976, holding her disqualified from August 1, 1976 through September 11, 1976 on the ground that she was discharged for misconduct connected with the work; and liable to refund the sum of $492.00, received as benefits during this period.

The claimant and the employer appeared.

FINDINGS OF FACT:

The claimant last worked as a meat wrapper at a supermarket, for the above employer, through August 2, 1976 on which date she was suspended for throwing a twenty-five pound piece of beef at the butcher. On August 4, 1976 the claimant called the personnel director and was told that she was discharged.

The claimant alleges that the butcher constantly made sexual overtures to her and used abusive language. She admits that she threw the beef at him after one of such incidents.

The assistant personnel director testified that he personally went to the store at two different times and interviewed thirty of the employees, who informed him that there was no "language problem" with the butcher and that, to the best of their knowledge, the claimant was "never verbally or sexually attacked."

The store manager testified that "no such conduct would be condoned" by management.

The claimant reopened an existing claim of September 17, 1975 and when her benefits were expired, she established a new claim. Reporting continued to date.

OPINION:

R.S. 43:21-5(b) provides:

"An individual shall be disqualified for benefits:

> "For the week in which he has been suspended or discharged for misconduct connected with his work, and for the five weeks which immediately follow such week (in addition to the waiting period), as determined in each case. In the event such discharge should be rescinded by the employer voluntarily or as a result of a mediation or arbitration this subsection (b) shall not apply, provided, however, an individual who is restored to employment with back pay shall return any benefits received under this chapter for any week of unemployment for which he is subsequently compensated by his employer."

"Misconduct within the meaning of the Unemployment Compensation Act excluding from its benefits an employee discharged for misconduct must be an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employees or negligence in such degree or recurrence as to manifest culpability, wrongful intent, or evil design or show an intentional and substantial disregard of the employer's interests, or of the employee's duties and obligations to the employer." 48 American Jurisprudence 541.

It is evident that the claimant was discharged for an act which could have caused injury to another employee. The claimant admits that she threw the beef at the butcher. The claimant's action was a deliberate disregard of standards of behavior which the employer had a right to expect and such conduct constitutes misconduct connected with the work. Hence, the claimant is disqualified from August 4, 1976 through September 11, 1976 under R.S. 43:21-5(b); and is liable to refund the sum of $492.00 received as benefits for weeks ending August 11, 1976 through September 15, 1976.

DECISION:

The claimant is disqualified from August 4, 1976 through September 11, 1976 under R.S. 43:21-5(b); and is liable to refund the sum of $492.00 received as benefits for weeks ending August 11, 1976 through September 15, 1976.

The determination of the Deputy is affirmed.

Sarah Getten

Sarah Getten
Appeals Examiner

APPEAL: October 8, 1976
HEARING: January 12, 1977
DATED: January 13, 1977
UA

SG:af
Date of Mailing: JAN 18 1977

BR 101,028-C-R

BOARD OF REVIEW

DEPARTMENT OF LABOR AND INDUSTRY
STATE OF NEW JERSEY

IN THE MATTER OF

CAROL A. DEMECH
605 OHIO AVENUE
TRENTON, NEW JERSEY 08638

DECISION

A & B NO 136-40-3135
DATE OF CLAIM SEPTEMBER 17, 1975
EMPLOYER A & P

The claimant filed a timely appeal from a decision of an Appeal Tribunal (AT76-23305-R) which held her disqualified for benefits under R.S. 43:21-5(b) as of August 4, 1976 through September 11, 1976 and is liable to refund the sum of $492.00 received as benefits for weeks ending August 11, 1976 through September 15, 1976.

This matter is reviewed on the record below.

FINDINGS OF FACT AND OPINION:

The findings of fact as developed by the Appeal Tribunal and the allegations of the appellant have been carefully examined.

Since the appellant was given a full and impartial hearing and a complete opportunity to offer any and all evidence, there is no valid ground for a further hearing.

On the basis of the record below, we agree with the decision reached.

DECISION:

The decision of the Appeal Tribunal (AT76-23305-R) is affirmed.

BOARD OF REVIEW

/s/ MORTON GOLDBLATT

/s/ HOWARD HEALD

A
Dated: March 1, 1977 (MG:HH:vp)

Aa 2

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JUL 3 1978

June 30, 1978

Mr. Richard Dana Krebs
Legal Aid Society of Mercer County
224 East Hanover Street
Trenton, NJ 08608

RE: Superior Court of New Jersey, Appellate Division
Docket No. A 3276-76

Dear Mr. Krebs:

This letter will confirm our conversation today regarding your request that the Great Atlantic and Pacific Tea Company as Respondent in this matter consent to your filing a substitute brief on behalf of Appellant Carol Demech. I understand that you have received a letter from the court noting the shortcomings in the original brief of the Appellant, which was filed pro se, and that you have discussed with the court the procedure for either amending that brief or filing a substitute.

While I would strongly prefer to have this matter considered by the court with as little additional time delay and expense as possible, rather than put you to the task of formally requesting permission of the court to file the substitute brief, I hereby grant my consent that you do so.

Sincerely,

Robert R. LeGros

Robert R. LeGros

RRL/ll

cc: Gerald E. Haughey, Esq.
Mark I. Siman, Esq.

Aa 3

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

DIVISION OF LAW
LABOR, INDUSTRY AND HEALTH SECTION
STATE HOUSE ANNEX
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SECTION CHIEF

July 3, 1978

Mr. Richard Dana Krebs
Legal Aid Society of Mercer County
224 East Hanover Street
Trenton, New Jersey 08608

Re: Carol Demech v. A & P and Board of Review
Docket No. A-3267-76

Dear Mr. Krebs:

Based upon Mr. LeGros' letter of June 30, 1978 I hereby give my consent to the filing of a substitute brief in the above captioned matter.

Very truly yours,

JOHN J. DEGNAN
Attorney General of New Jersey

By: Mark I. Siman
Mark I. Siman
Deputy Attorney General

MIS:dp

cc: Robert L. LeGros
Gerald E. Haughey, Esq.

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OUR FILE NO.

June 30, 1978

Richard Krebs, Esq.
Legal Aid Society
224 East Hanover Street
Trenton, New Jersey 08608

Re: Carol Demech v. Brd. of Review, et al.
A-3267-76

Dear Mr. Krebs:

I have spoken to Mr. LeGros and agree with the contents of his letter dated June 30, 1978 regarding the substitute Brief.

Very truly yours,

Gerald E. Haughey, Esq.

GERALD E. HAUGHEY

GEH/jp