IN THE SUPERIOR COURT OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DARRYL S. WALLINGTON,	)	
	)	
	)	
Appellant,	)	
	)	
v.	)	C.A. No. N12A-08-007-WCC
	)	
PERFORMANCE STAFFING	)	
and THE UNEMPLOYMENT	)	
INSURANCE APPEAL BOARD,	)	
	)	
Appellees.	)	

Submitted: December 6, 2012
Decided: March 28, 2013

Appeal from the Unemployment Insurance Appeal Board –AFFIRMED

OPINION

Darryl S. Wallington. 500 Rodman Street, Wilmington, DE 19805. *Pro Se* Appellant.

Noel E. Primos, Esquire. 414 S. State Street, P.O. Box 497, Dover, DE 19903. Attorney for Appellee Performance Staffing.

Caroline L. Cross, Esquire. Department of Justice, 820 N. French Street, Wilmington, DE 19801. Attorney for Unemployment Insurance Appeal Board.

CARPENTER, J.

Darryl S. Wallington ("Wallington") appeals the August 8, 2012 decision by the Unemployment Insurance Appeals Board ("UIAB"), which affirmed the Appeals Referee's denial of unemployment compensation benefits. Wallington, who was employed by Performance Staffing as a temporary employee, challenges the UIAB's finding that he is ineligible to receive benefits because he refused an offer of work for which he was reasonably suited. Specifically, Wallington argues that: 1) there was an "agreement/understanding" between himself and Professional Staffing that he would not be assigned work in hospitals; 2) he was not "reasonably fitted" for the last food service position Professional Services offered him because the position was in a hospital; and 3) he only filed for unemployment benefits after he tried and failed to secure other work with Professional Staffing in January and February of 2012.

Upon review of the record in this matter, the decision of the UIAB is hereby **AFFIRMED**.

FACTUAL BACKGROUND

Wallington was employed by Professional Staffing, a temporary staffing agency, on an intermittent basis from January 2007 until December 2011. On December 14, 2011, Wallington completed a temporary assignment doing food service work at Wilmington Trust. On December 21, 2011, Performance Staffing offered Wallington a food service position at Christiana Hospital. However,

Wallington turned down this position; Wallington stated that he previously contracted MRSA when working at a hospital and, therefore, would not work at a hospital again except to shovel snow outside. Wallington did not complete any additional assignment for Performance Staffing after refusing this offer.

PROCEDURAL BACKGROUND

Wallington filed a claim for unemployment benefits effective March 4, 2012. The Claims Deputy denied the claim on March 22, 2012, finding Wallington was not entitled to the receipt of unemployment benefits under 19 *Del. C.* § 3314(3)(c) because he refused an offer of work for which he was reasonably suited. Wallington filed a timely appeal to the Appeals Referee. A hearing took place before the Appeals Referee on April 24, 2012, at which Wallington appeared on his own behalf and Kristen Floyd, a Performance Staffing representative, testified on behalf of Performance Staffing. In a decision mailed April 27, 2012, the Appeals Referee affirmed the Claims Deputy's denial of benefits, finding that Wallington was disqualified from receiving benefits under 19 *Del. C.* § 3314(3)(c) because he constructively refused an offer of work for which he was reasonably suited.

Wallington then appealed to the UIAB, which held a hearing on July 25, 2012. At each stage of the administrative proceedings, Wallington has insisted that he did not refuse an offer for which he was reasonably suited. Additionally,

Wallington testified on his own behalf before the UIAB that he had made it clear to Performance Staffing that he would not work in a hospital, which he believed amounted to an informal agreement/understanding. Finding that Wallington had refused an offer of work for which he was reasonably suit and that his fear of getting sick did not fall under an exception pursuant to 19 *Del. C.* § 3314(3)(c), the UIAB affirmed the Appeals Referee's denial of benefits on August 2, 2012.

The Appellant filed a *pro se* appeal in this Court on August 33, 2012. Only Performance Staffing filed a response brief.

STANDARD OF REVIEW

The Delaware Supreme Court and this Court have repeatedly emphasized the Court's limited appellate review regarding an administrative agency's factual findings.[1] On appeal, the Court's review of the UIAB's decision is limited to determining whether the UIAB's findings and conclusions are supported by substantial evidence and free of legal error.[2] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[3] Stated alternatively, substantial evidence is "that evidence from which an agency fairly and reasonably could reach the conclusion it did."[4]

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[1] *Indus. Rentals, Inc. v. New Castle County Bd. of Adjustment,* 2000 WL 710087 (Del. Super. May 15, 2000), *rev'd on other grounds*, 776 A.2d 528 (Del. 2001); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 382 (Del. 1998).
[2] *Unemployment Ins. Appeals Bd. of the Dept. of Labor v. Duncan*, 337 A.2d 308, 209 (Del. 1975).
[3] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981).
[4] *Mellow v. Bd. of Adjustment of New Castle County*, 565 A.2d 947, 954 (Del. Super. 1988) (citing *Nat'l Cash Register v. Riner*, 424 A.2d 669, 674-75 (Del. Super. 1980)).

Specifically, "[i]t is more than a scintilla of evidence, but less than a preponderance."[5]

However, when reviewing a decision on appeal from the UIAB, the Court "does not weigh the evidence, determine questions of credibility, or make its own factual findings."[6] It is well established that it is the role of the UIAB—not this Court—to resolve conflicts in testimony and issues of credibility.[7] The UIAB's findings are conclusive and will be affirmed if supported by "competent evidence having probative value."[8] Further, the Court must give deference to "the experience and specialized competence" of the UIAB.[9] This Court, therefore, "does not sit as the trier of fact, nor should the Court replace its judgment for that of the [UIAB]."[10] As a result, if substantial evidence exists and there is no error of law, the Court must affirm the UIAB's decision.[11]

DISCUSSION

Wallington contends the following constitute grounds to appeal the UIAB's decision: 1) "Performance staffing has a clause in their contract that states you may refused [sic] any assignment [and] it will not be held against

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[5] *Olney*, 425 A.2d at 614.
[6] *ILC of Dover, Inc. v. Kelley*, 1999 WL 1427805 (Del. Super. Nov. 22, 1999) (citing *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965)).
[7] *See Mooney v. Benson Mgmt. Co*., 451 A.2d 839, 841 (Del. Super. 1982), *rev'd on other grounds*, 466 A.2d 1209 (Del. 1983).
[8] *Geegan v. Unemployment Comp. Comm'n.*, 76 A.2d 116, 117 (Del. Super. 1950).
[9] *Reeves v. Conmac Sec.*, 2006 WL 496136, at *3 (Del. Super. Feb. 21, 2006) (citing *Histed v. E.I. DuPont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993)).
[10] *Id.* at *3 (citing *Johnson*, 213 A.2d at 66).
[11] *Stevens v. State*, 802 A.2d 939, 944 (Del. Super. 2002).

you"; 2) "[b]ut if you take the assignment and not go[,] you will be fired"; and 3) "[he] did the opposite [and he] refused the assignment several times and it was not a problem until [he] filed for unemployment . . . ."[12] After reviewing the UIAB's decision and the record in this case, the Court concludes that the UIAB committed no legal error in finding that Wallington was disqualified from the receipt of unemployment benefits.

Under Delaware law, an individual is disqualified from the receipt of unemployment benefits "if the individual has refused to accept an offer of work for which the individual is reasonably fitted . . . ."[13] If the UIAB disqualifies an individual from the receipt of unemployment benefits due to the individual's refusal of an offer of work for which the individual was reasonably suited, this Court, on appeal, performs the following a three-part analysis to ensure that: 1) the individual received notice of an offer of employment; 2) the individual refused this offer of employment; and 3) the individual was "reasonably fitted" for the work offered."[14] Additionally, this Court evaluates whether the individual's situation qualifies as one of the permitted statutory exceptions, which allow an individual to receive unemployment benefits even if the

[12] R. (Notice of UIAB Appeal Filed August 13, 2012, Transaction ID # 46229176).
[13] 19 *Del. C.* § 3314(3).
[14] *See Quinones v. Access Labor*, 2009 WL 5177148, at *1 (Del. Super. July 13, 2009).

individual refused an offer of work for which the individual was reasonably fitted.[15]

First, the Court determines whether Wallington received notice of an offer of employment. To satisfy this requirement, the "employer bears the burden of providing a claimant with notice of a suitable job offer."[16] However, "a claimant may not be considered to have refused an offer of work of which he had no knowledge."[17] Here, there is no dispute that Performance Staffing provided Wallington with sufficient notice of the job offer for a food service position at Christiana Hospital. The Court finds that Wallington's testimony and Performance Staffing's call logs sufficiently indicate that Wallington was offered this temporary position on December 21, 2011.

Having satisfied the first part, the Court next determines whether Wallington refused the offer of employment of which he was notified. Previously, this Court has held that "the Unemployment Compensation Law contemplates, 'that an unemployed person must be available at all times to accept suitable employment and a refusal on his part to do so will disqualify him for benefits under the law.'"[18] "Th[is] Court further noted that, 'a refusal to accept work, in order to disqualify a claimant, must be deliberate on the part of the

[15] *See* 19 *Del. C.* § 3314(3).
[16] *Quinones*, 2009 WL 5177148, at *2 (citing *Jewell v. Unemployment Comp. Comm'n*, 183 A.2d 585, 587 (Del. 1962)).
[17] *Id.* at *3 (citing *Jewell v. Unemployment Comp. Comm'n*, 183 A.2d 585, 587 (Del. 1962)).
[18] *Id.*

claimant, for he cannot be held to have refused an offer unless he has actually done so.'"[19] Here, the Court finds that Wallington deliberately refused to accept Performance Staffing's offer to work at Christiana Hospital. Although there is some dispute as to whether an informal agreement/understanding existed between Wallington and Performance Staffing regarding his "inability" to work at hospitals, the Court finds that Wallington's testimony and Performance Staffing's call logs clearly indicate that regardless of the reason for doing so, Wallington refused to accept the offer of employment at Christiana Hospital.

Having satisfied the second part, the Court next determines whether Wallington was "reasonably fitted" for the work offered at Christiana Hospital. Previously, this Court has held that "an individual is 'reasonably fitted for work when the offer of employment is similar to the individual's previous training and experience, and as a result can be performed with minimal additional training.'"[20] Further, this Court has noted that "additional factors to consider include 'the individual's prior earnings, physical fitness, length of unemployment, and prospects for securing work in his/her customary occupation.'"[21] Here, as noted by the UIAB, Wallington had recently completed an assignment at Wilmington Trust, which was a food service position that paid $9/hour, when Performance Staffing offered him the food service position at Christiana Hospital, which also

[19] *Id.*
[20] *Id.* at *3 (citing *Pinkett v. Barrett Bus. Servs Inc..,* 2001 WL 167845, at *3 (Del. Super. Jan. 23, 2001)).
[21] *Id.* (citations omitted).

paid $9/hour. Therefore, the Court finds that Wallington's previous employment at Wilmington Trust indicates he was reasonably fit for the Christiana Hospital food service position he was offered.

Having found that Wallington received notice of the offer of employment with Christiana Hospital, refused this offer, and was reasonably suited for this food service position, the Court next evaluates whether Wallington qualifies for an exception that would allow him to receive unemployment benefits despite refusing an offer of employment for which he was reasonably fitted. Here, Wallington claimed he had an agreement/understanding with Performance Staffing that he would refuse any hospital work due to his fear of contracting MRSA again and even offered his medical records to bolster his rationale for turning down the Christiana Hospital position. However, this does not fall within one of the permitted statutory exceptions under 19 *Del. C.* § 3314(3), which states that "[n]o individual otherwise qualified to receive benefits shall lose the right to benefits by reason of a refusal to accept a referral or new work if:

> a. As a condition of being so employed, the individual would be required by the employer to join a company union or would be required by the employer to resign from or refrain from joining any bona fide labor organization or would be denied the right by the employer to retain membership in and observe the lawful rules of any such organization;
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> b. The position offered is vacant due directly to a strike, lockout or other labor dispute;

> c. The work is at an unreasonable distance from the individual's residence, having regard to the character of the work the individual has been accustomed to do, and travel to the place of work involves expenses substantially greater than that required for the individual's former work;
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> d. The remuneration, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or
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> e. The referral or offer was for full-time work and the individual is permitted to seek only part-time work under the provisions of § 3315(3) of this title."[22]

At best, Wallington could have made the attenuated argument that working in a hospital environment in which he could contract MRSA again constituted "less favorable" working conditions pursuant to 19 *Del. C.* § 3314(3)(d). However, as noted by the UIAB, Wallington provided no evidence that the Christiana Hospital position posed an immediate threat or created an exceptional risk he would contract MRSA again. Therefore, while the Court appreciates Wallington's apprehension, it, like the UIAB, must find that Wallington refused this offer of employment due to personal preferences, which do not qualify as a statutory exception that would entitle him to unemployment benefits. Finding that Wallington refused an offer of work for which he was reasonably suited and that he does not meet one of the permitted statutory exceptions, the Court finds there is substantial evidence to support the UIAB's decision and will not disturb it on appeal.

[22] 19 *Del. C.* § 3314(3).

CONCLUSION

For the reasons stated above, the Court concludes that the decision of the Unemployment Insurance Appeals Board is hereby **AFFIRMED**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.