IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DIAMOND STATE PORT CORPORATION,	)	
Employer-Appellant,	)	
v.	)	C.A. No. 02A-03-006 JRS
STANLEY FERGUSON,	)	
Claimant-Appellee,	)	
and	)	
UNEMPLOYMENT INSURANCE APPEAL BOARD	)	
Appellee.	)	

Submitted: October 24, 2002
Decided: January 23, 2003

O R D E R

This 23rd day of January, 2003, upon consideration of the appeal of Diamond State Port Corporation ("Diamond State" or "Employer") from the decision of the Unemployment Insurance Appeal Board (the "Board") dated March 7, 2002, granting Stanley Ferguson's ("Mr. Ferguson") application for benefits, the parties' briefs and the record below, it appears to the Court that:

1. Mr. Ferguson worked for Diamond State from March of 1993 until October of 2001 as a meat packer. In the months leading up to October, 2001, Mr. Ferguson had made an arrangement with his supervisor whereby he would be sent home from work in the event concerns were raised about his work. It was agreed that such issues would be addressed the following day or at a later date, and that Mr. Ferguson would not be terminated from his position solely because he had been excused from the job site for the day.

2. On October 11, 2001, Mr. Ferguson worked in the warehouse wrapping meat pallets. Mr. Ferguson's usual supervisor was not present that day. At some point during the morning, the new supervisor, Michael Phillips ("Mr. Phillips"), instructed each employee to wrap five pallets in the morning and five pallets in the afternoon. Mr. Ferguson wrapped his five pallets in the morning and, before lunch, he began to wrap his five pallets for the afternoon. He marked these pallets with his initials. After lunch, a co-worker claimed that he had wrapped the pallets marked with Mr. Ferguson's initials. An argument ensued, and Mr. Phillips stepped in to resolve the conflict. Mr. Phillips directed Mr. Ferguson to complete the co-worker's pallets. Mr. Ferguson refused. Mr. Phillips repeated this order, and when Mr. Ferguson continued to argue, Mr. Phillips directed Mr. Ferguson to leave the work site. Again, Mr. Ferguson refused. Mr. Phillips called security personnel who

repeated the order to leave. Mr. Ferguson finally complied and was told not to return until Philip Immediato ("Mr. Immediato"), the Director of Human Resources, contacted him. Over the next several days, Mr. Immediato gathered information about the October 11th incident and terminated Mr. Ferguson thereafter.

3. Mr. Ferguson filed a claim for unemployment insurance benefits with the Delaware Department of Labor on September 23, 2001. The Claims Deputy denied Mr. Ferguson's request for benefits, finding that Diamond State had "just cause" to terminate him for insubordination and misconduct. On appeal, the Appeals Referee affirmed the Claims Deputy, concluding that Mr. Ferguson refused to follow two orders from his supervisor and that "the claimant was discharged from work for just cause."[1] Mr. Ferguson appealed again, and the Board reversed the Referee's decision. In support of their decision, the Board stated: "[t]he Board does not find that there was a blatant refusal to perform work, but rather that the claimant thought he had completed all the work which he was required to do."[2] Therefore, the Board concluded that Diamond State did not have "just cause" to terminate Mr. Ferguson.

4. Diamond State, in the current appeal, makes two primary arguments addressing the Board's factual finding that Mr. Ferguson's "behavior can be

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[1]D.I. 4, at 19.

[2]*Id.* at 24.

accounted for by the fact that he had an arrangement with his previous supervisor whereby, at times, he would refuse to do work and then be sent home, but not fired."[3] First, Diamond State argues that to reach this conclusion, the Board relied solely on Mr. Ferguson's account of a "hearsay" communication he had with his former supervisor about their prior arrangement. Diamond State's second contention is that the Board's explanation for Mr. Ferguson's behavior does not account for Mr. Ferguson's refusal to leave the work site when requested.

5. The role of the Court when reviewing an appeal from the Board is well settled. The Court reviews the Board's decision to determine whether its factual findings are supported by substantial evidence and reviews its ultimate decision to ensure that it is free from legal error.[4] Substantial evidence has been defined as relevant evidence that a reasonable mind might accept as an adequate basis to support a conclusion.[5] Substantial evidence requires "more than a scintilla but less than a preponderance" of evidence to support the finding.[6] The Court does not weigh evidence, assess credibility, or make independent factual findings.[7]

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[3] *Id.*

[4] *Diamond Materials v. Manganaro,* 1999 Del. Super. LEXIS 274, at *5.

[5] *Oceanport Indus. v. Wilmington Stevedores,* 636 A.2d 892, 899 (Del. 1994).

[6] *Johnson v. Delaware Car Co.*, 1995 Del. Super. LEXIS 275, at *5.

[7] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

6. Both parties agree that Diamond State discharged Mr. Ferguson and, therefore, Title 19, Section 3315(2) of the Delaware Code applies. Under Section 3315(2), an employee is not qualified to receive benefits "[f]or the week in which the individual was discharged from his 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."[8] "Just cause" is defined as a "wilful or wanton act in violation of either the employer's interest, or of the employee's duties, or of the expected standard of conduct."[9] The employer must prove by a preponderance of the evidence that the employee was discharged for "just cause."[10]

7. Even though Mr. Ferguson refused two directives from Mr. Phillips, the Board found that Diamond State did not have "just cause" to fire Mr. Ferguson. The Board's conclusion that Diamond State did not have "just cause" to terminate Mr. Ferguson for his initial refusal to perform his work as directed is supported by substantial evidence. Mr. Ferguson's uncontested testimony supports the Board's finding that the prior supervisor had permitted Mr. Ferguson to refuse to work and to leave for the day. If the employer tolerated this "insubordinate" act in the past, Delaware law requires the employer to give notice to an employee before terminating

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[8] DEL. CODE ANN. tit. 19, § 3315(2)(1995).

[9] *Abex Corp. v. Todd*, 235 A.2d 271, 272 (Del. Super. 1967).

[10] *Brighton Hotels, L.L.C. v. Gennett*, 2002 Del. Super. LEXIS 372, at *6.

the employee for the same conduct.[11] Looking only at Mr. Ferguson's past arrangement with his former supervisor and without regard to the hearsay testimony relating to the former supervisor's statements, Diamond State did not establish "just cause" because Diamond State did not give the requisite notice.

8. Mr. Ferguson, however, also disregarded Mr. Phillip's second instruction to leave the work site. Mr. Ferguson admits to his noncompliance with Mr. Phillips' order, which also creates substantial evidence in the record of insubordination. The Board's factual findings described the prior arrangement between Mr. Ferguson and his supervisor: "at times, he would refuse to do work and then be sent home, but not fired."[12] The prior arrangement contemplated Mr. Ferguson being sent home, but it did not contemplate that Mr. Ferguson could refuse the supervisor's instructions to leave. There is no evidence to indicate that Diamond State tolerated Mr. Ferguson's disobedience of an order to leave the work site in the past. Therefore, the Court must now consider if Mr. Ferguson's refusal to leave the work site constituted "just cause"

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[11] *See id.* at *9 (concluding that employer did not have just cause to terminate employee for unexcused absence when the employer had tolerated such conduct in the past and had not alerted the employee that his absences would no longer be tolerated); *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1268 (Del. 1981)("These cases stand for the proposition that '[a] single instance of irresponsible failure to heed an employer's instructions does not rise to the level of a wilful or wanton act in violation of the employee's expected standard of conduct where it appears that the employer tolerated previous actions of similar severity without warning.")(quoting *Boughton v. Div. of Unemployment Ins.*, 300 A.2d 25 (Del. Super. 1972)).

[12] D.I. 4, at 24.

under Delaware law.

9. Although the Board did not address Mr. Ferguson's refusal to leave the work site in its decision, a remand is unnecessary.[13] The testimony that Mr. Ferguson refused to leave on October 11th and that Diamond State had not tolerated his refusal to leave in the past stands uncontested in the record. These undisputed facts are "just cause" for termination under Delaware law. The facts of *Foraker v. Diamond State Recycling*[14] are analogous. In *Foraker*, the supervisor instructed the employee to park his truck and go home.[15] The employee refused to follow this instruction and continued to argue his point, much like Mr. Ferguson.[16] The court concluded that the employee was terminated for "just cause," stating that "[a]n employee's refusal to follow specific instructions or orders from a superior is clearly 'just cause' for termination."[17] Similarly, Mr. Ferguson's noncompliance with the employer's reasonable instruction to leave the work site provided "just cause" termination. Because Diamond State demonstrated "just cause" under Section 3315(2), Mr.

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[13] *See Brighton Hotels*, 2002 Del. Super LEXIS 372, at *10 (deciding that a remand is unnecessary because the record contained uncontested facts).

[14] 2001 Del. Super. LEXIS 423.

[15] *Id.* at *7.

[16] *Id.*

[17] *Id.*

Ferguson is disqualified from receiving unemployment insurance benefits.

10. Based on the foregoing, the Board's decision to grant Mr. Ferguson's application for unemployment insurance benefits is **REVERSED.**

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: Stanley Ferguson
Sherry V. Hoffman, Deputy Attorney General
Stephani J. Ballard, Esquire