

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

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|-----------------------------|---|-------------------------|
| CALDWELL STAFFING SERVICES, |) | |
| |) | |
| Employer-Appellant, |) | |
| |) | |
| v. |) | C.A. No. 02A-07-003 JRS |
| |) | |
| SHANTELL L. WILLINGHAM, |) | |
| |) | |
| Employee-Appellee, |) | |
| |) | |
| and |) | |
| |) | |
| UNEMPLOYMENT INSURANCE |) | |
| APPEAL BOARD, |) | |
| |) | |
| Appellee. |) | |

Submitted: November 13, 2002
Decided: February 6, 2003

*Appeal From the Unemployment Insurance Appeal Board -- **REMANDED.***

ORDER

This 6th day of February, 2003, upon consideration of the appeal of Caldwell Staffing Services (“Caldwell Staffing”) from the decision of the Unemployment Insurance Appeal Board (the “Board”), dated June 23, 2002, granting Shantell Willingham’s application for benefits, it appears to the Court that:

1. Caldwell Staffing, a temporary employment agency, employed Ms. Willingham from January 2001 through December 2001. Ms. Willingham was

assigned to work at Student Financial Corporation (“SFC”). On December 15, 2001, a newly-hired SFC employee arrived late to work, and she was upset and apprehensive about the consequences of being late. Ms. Willingham claims that she attempted to console the other employee; she denies making derogatory comments about management during this discussion. A supervisor at SFC, Fernando Feliciano (“Mr. Feliciano”), testified that he overheard Ms. Willingham speaking negatively about SFC management. Mr. Feliciano and another supervisor then brought Ms. Willingham into a separate conference room and attempted to counsel her. Mr. Feliciano claimed that Ms. Willingham became angry and loud and that she was told to lower her voice twice. She refused both times, and the supervisors sent her home. She was effectively terminated thereafter.¹

2. Ms. Willingham filed for unemployment insurance benefits on December 30, 2001. The Claims Deputy awarded her benefits because Caldwell Staffing had not proven it had “just cause” to terminate Ms. Willingham. The Appeals Referee reversed the Claims Deputy based on Mr. Feliciano’s description of Ms. Willingham’s misconduct. In turn, the Board reversed the Appeals Referee, concluding that Ms. Willingham’s testimony was more persuasive.

3. Caldwell Staffing has raised several arguments on appeal. First, it alleges when James Randall (“Mr. Randall”), the President of Caldwell Staffing, was denied the opportunity to cross examine Ms. Willingham, Caldwell Staffing was denied due process of law. Caldwell Staffing has submitted an affidavit from Mr. Randall in which he avers that a Board representative told him *off the record* that he could not

¹Ms. Willingham remained on the employee list of Caldwell Staffing, but she did not receive a new assignment, even though she called every available week. Neither party contested the Board’s finding that she was fired.

cross-examine Ms. Willingham. All of the parties admit that, beyond Mr. Randall’s affidavit, there is no evidence in the record that the Board’s representative made this statement. Second, Caldwell Staffing contends that the Board’s finding that Ms. Willingham was discharged without “just cause” is not supported by substantial evidence. Finally, Caldwell Staffing argues that the Board erred in awarding Ms. Willingham benefits because: 1) the Board denied Caldwell Staffing’s opportunity to participate meaningfully in the hearing by disallowing cross examination of Ms. Willingham; 2) the Board misapplied the law regarding insubordination as “just cause” for termination; and 3) the Board accepted Ms. Willingham’s “untested version of the events” without considering the inconsistencies in her statements.²

4. The Court’s review of the Board’s decision is limited to the record submitted by the Board.³ The Court cannot make additional factual determinations or assess the witnesses’ credibility.⁴ Rather, the Court’s inquiry is limited to whether the Board’s factual findings are supported by substantial evidence and whether the Board erred in reaching its legal conclusions.⁵

5. The Court does not have before it an adequate record to review Caldwell Staffing’s due process argument. A threshold factual issue remains unresolved: whether the Board’s representative denied Mr. Randall the opportunity to cross examine. To prove the point, Caldwell Staffing has submitted Mr. Randall’s

²D.I. 10, at 9.

³*See Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976)(“[T]he Superior Court is limited to consideration of the record which was before the administrative agency.”).

⁴*Coleman v. Dep’t of Labor*, 288 A.2d 285, 287 (Del. Super. 1972); *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

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

affidavit and directed the Court to another case, *Caldwell Staffing Services v. Ramrattan*,⁶ where the court observed that the Board had adopted a policy which prohibits *pro se* employers from cross examining witnesses at Board hearings.⁷ While *Ramrattan* suggests that restricted cross examination by *pro se* employers may be an ongoing Board policy, the Court cannot conclude on the basis of a procedure in another case that the Board employed that same procedure here.

6. Because the factual record is incomplete and the Court is prohibited from making additional factual determinations, the Court must remand this case to the Board.⁸ The Board shall complete the record by deciding whether a representative of the Board told Mr. Randall that he could not cross examine Ms. Willingham. In this regard, the Board should receive verified statements from all of its representatives involved in the hearing addressing whether Mr. Randall was advised that he could not cross examine witnesses during the hearing. Factual findings on remand should then be prepared in writing and submitted to the Court within forty-five (45) days of this Order.

7. Based on the foregoing, the Court **REMANDS** this case to the Board to complete the record in accordance with the Court's instructions above.

⁶2003 WL 194734 (Del. Super.).

⁷*See id.* at *1 (noting that counsel for the Board refused to allow Mr. Randall to question a witness for Caldwell Staffing: "You can't ask her questions. She's just got to testify."). The court agreed that prohibiting cross examination constituted a denial of due process. *Id.* at *4.

⁸ *See Div. of Unemployment Ins. v. Cavan*, 1997 Del. Super. LEXIS 473, at *17 (remanding the case to the Board because the Board and the Referee did not "make a factual determination as to whether the operators in 1993 performed services for wages"); *Harper v. Unemployment Ins. Appeal Bd.*, 293 A.2d 813, 816 (Del. Super. 1972)(reversing and remanding to Board to determine the nature of the claimant's job and whether there is a market for such services).

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to the Prothonotary

cc: Robert F. Stewart, Jr., Esquire
Susan E. Flood, Esquire
Stephani Ballard, Esquire