IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

LINDA BRIGHT,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	C.A. No. 05A-01-010 MMJ
DELAWARE RIVER	)	
STEVEDORES, INC., and	)	
UNEMPLOYMENT INSURANCE	)	
APPEAL BOARD,	)	
	)	
Appellees.	)	

Submitted: June 7, 2005
Decided: September 12, 2005

ORDER

UPON APPEAL FROM A DECISION OF THE UNEMPLOYMENT INSURANCE APPEAL BOARD.

AFFIRMED AS TO FINDING THAT CLAIMANT IS NOT ELIGIBLE FOR UNEMPLOYMENT BENEFITS

Having reviewed the parties' submissions in this appeal of a decision of the Unemployment Insurance Appeal Board ("UIAB" or "Board") affirming the decision of Rudolph J. Antonini, Jr., Chief Appeals Referee ("Referee"), and denying Linda Bright ("Claimant")'s appeal on the basis that under the totality of the circumstances, Claimant was a casual employee, and that Claimant voluntarily ended her

employment, and thus was ineligible for unemployment benefits, the Court concludes as follows:

1. Claimant worked as a nonunion worker for Delaware River Stevedores, Inc. ("DRS") from May 15, 1999 until September 2, 2004. As a casual laborer, Claimant was hired on a day-to-day basis to supplement the basic work force. Claimant could only be hired when all of the available registered work force had been hired.

2. A DRS casual worker has no guaranteed number of work hours and no expectation of regular employment or income. In order for a casual worker to become eligible for union membership, he or she must work at least 1,000 hours in one year. Also, a casual worker must pass a physical examination, including a drug screen and an audiogram.

3. As of August 31, 2004, Claimant had worked enough hours in the year to be eligible to apply for union membership and a position on the secondary workforce. Claimant voluntarily chose to apply for the secondary workforce position and voluntarily chose to undergo a physical exam. Because Claimant failed the physical examination, she could not become part of the secondary workforce. Likewise, as a result of failing the physical, Claimant was no longer eligible to work

as a member of the casual workforce. Subsequently, Claimant passed a physical examination in March 2004 and obtained union membership in December 2004.

4. Claimant filed an application for unemployment benefits on September 12, 2004. A hearing was conducted before the Referee on November 16, 2004 ("Hearing"), with Claimant and Harry Mullen as the representative of DRS in attendance. Neither party was represented by counsel at the Hearing, but both sides were given an opportunity to present their case.

5. Following the Hearing, the Referee concluded that Claimant was disqualified from receiving unemployment benefits under the totality of the circumstances test, and because she voluntarily left work without good cause attributable to such work.

6. Claimant appealed the Referee's decision to the UIAB which denied her request for an additional hearing. The UIAB affirmed the Referee's decision and concluded that it was supported by substantial evidence and free from legal error. The UIAB agreed that, as a matter of law, under the totality of the circumstances, Claimant's casual employment cannot provide an expectation of regular employment and/or income or an intent to remain as permanently as the job allows.[1]

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[1] *See Hill v. Diamond State Port Corp.*, 1999 WL 1611426, at *4 (Del. Super.).

7. Claimant has appealed the decision of the UIAB denying Claimant unemployment benefits.

8. Claimant asserts that her claim was denied on the basis of erroneous and misleading statements made by Mullen to Referee. Claimant claims that she did not stop working of her own volition. She was notified that she could no longer seek employment at the Hiring Centers in Wilmington and Philadelphia because she did not pass a pre-employment physical.

9. Claimant argues that she had been working on the docks for over five years. In those five years, Claimant was never fired, dismissed or declared to be physically unable to perform the work. Before the pre-employment physical test, she had the "expectation of regular employment and income" and "to remain as permanently as the job allows."

10. Claimant asserts that the Referee and the UIAB should have questioned and rejected the pre-employment physical test. Claimant claims that the fact that she had been working in the industry for over five years and had acquired the necessary hours to become a card-carrying member of the union workforce, proves that the test was harder than the job, and that there is no compelling need for it.

11. DRS argues that the Board has discretion as to whether to review and reconsider decisions rendered by the Appeals Referee.[2] Therefore, the Board's decision to deny Claimant's application for further appeal and hearing was within its discretion. The Board's decision also was in accordance with 19 *Del. C.* § 3320.[3]

12. DRS claims that the undisputed testimony and evidence supported the Referee's conclusion that Claimant was a casual employee with no expectation of continued employment and no right to unemployment benefits. Claimant was hired only on an as-needed basis. Claimant presented no evidence establishing that she intended to "remain permanently employed as the job allowed."[4]

13. DRS asserts that in the Hearing before the Referee, Claimant was given an opportunity to present testimony and evidence. Claimant did not dispute any of the evidence introduced by Mullen. In fact, Claimant provided little testimony other than confirmation that she failed the physical exam which was required to become a member of the secondary workforce.

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[2] *Lacy v. Wilmington Stevedores*, 1996 WL 280894, at *2 (Del. Super.).

[3] 19 *Del. C.* § 3320 states:
The Unemployment Insurance Appeal Board may on its own motion affirm, modify or set aside any decision of an appeal tribunal on the basis of the evidence previously submitted in such case or direct the taking of additional evidence or may permit any of the parties to such decision to initiate further appeal before it.

[4] *Hill v. Diamond State Port Corp.*, 1999 WL 1611426, at *4 (Del. Super.).

14. DRS argues that Delaware courts are clear that casual employees like Claimant are not eligible for unemployment benefits.[5] Claimant failed to satisfy her burden of proving that she was qualified for unemployment benefits. Claimant failed to produce any evidence or testimony establishing that she was anything other than a sporadic casual laborer at DRS.

15. Some of the findings of the Referee's November 19, 2004 decision are as follows:

- Claimant had the required one thousand hours to begin the process of applying for membership in the secondary workforce. However, another provision requires that an employee pass the physical examination in order to become a member of the secondary workforce. Claimant failed the physical examination and could not become a part of the secondary workforce.
- Claimant failed the isokinetic portion of the test which measures strength and as a result, Claimant failed the physical examination administered by NovaCare. Since Claimant failed the physical examination, Claimant does not qualify for the position of a longshore person and cannot become a member of the secondary workforce.

[5] *See Hill*, 1999 WL 1611426, at *4.

- 19 *Del.C.* § 3314(1) provides that an individual shall be disqualified for benefits:

> (1) For the week in which the individual left work voluntarily without good cause attributable to such work and for each week thereafter until the individual had been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount.

- An employee who voluntarily terminates his employment will be disqualified from the receipt of unemployment benefits unless the employee can show that there was good cause for leaving, and that the reason or reasons for doing so were directly related to the employee's work or to employer. Good cause can be found where there has been a substantial reduction in hours, wages or a substantial deviation in the working conditions from the original agreement of hire to the detriment of the employee.
- Claimant's casual employment is of such a nature that she had no expectation of regular employment and/or income. Claimant was a casual worker with DRS who had no hiring preference and was hired on a day by day basis to supplement the union workforce.

- Claimant's casual employment cannot provide an expectation of regular employment and income nor did Claimant have an intent to remain as permanently employed as the job allows.
- Under the totality of the circumstances test, Claimant is disqualified from receiving unemployment benefits because she voluntarily left her work without good cause attributable to such work.

16. The Supreme Court and this Court have repeatedly emphasized the limited appellate review of the factual findings of an administrative agency. In reviewing the decisions of the agency, this Court must determine whether the findings and conclusions of the Board are free from legal error and supported by substantial evidence in the record.[6] The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence.[7] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[8] The appellate court does not weigh the evidence, determine

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[6]*See Unemployment Insurance Appeal Board v. Martin*, 431 A.2d 1265 (Del. 1981); *Ponchvatilla v. United States Postal Service*, Del. Super., C.A. No. 96A-06-19, Cooch, J. (June 9, 1997), Mem. Op. at 2; 19 Del. C. § 3323(a)("In any judicial proceeding under this section, the findings of the [UIAB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.").

[7]*Johnson v. Chrysler Corporation*, 213 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960).

[8]*Oceanport Ind. V. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battisa v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986), *appeal dismissed*, 515 A.2d 397 (Del. 1986).

questions of credibility, or make its own factual findings.[9] It merely determines if the evidence is legally adequate to support the agency's factual findings.[10]

17. The Court finds that the decision of the Referee took into account not only the record of the case, but also the testimony of both Claimant and DRS. During the Hearing, both Claimant and Mullen were given the opportunity to present their positions.

18. In his decision, Referee clearly stated the relevant law and facts on the issue of whether Claimant was eligible for unemployment benefits because she was a casual laborer with no expectation of regular employment or income. The undisputed testimony and evidence supports the Referee's conclusion that Claimant was a casual employee and, therefore, not entitled to unemployment benefits. Having made this finding, the Referee need not have reached the issue of whether Claimant had voluntarily terminated employment and what constituted good cause.

19. It appears to the Court that in affirming the decision of the Referee and denying benefits to Claimant, the Board adopted the pertinent findings of fact and conclusions of law of the Referee, for which there was adequate evidence in the record.

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[9] *Johnson v. Chrysler*, 213 A.2d at 66.

[10] 29 *Del. C.* § 10142(d).

20. **THEREFORE,** the Board's decision denying Claimant's appeal on the basis that under the totality of the circumstances test, Claimant was a casual employee and not eligible for unemployment benefits, is hereby **AFFIRMED**. The Board's decision affirming the Referee's finding that Claimant voluntarily ended her employment, and thus was ineligible for unemployment benefits is not necessary to determination of the issue of eligibility and, therefore, will be treated as dicta.

IT IS SO ORDERED.

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The Honorable Mary M. Johnston

Orig: Prothonotary