IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELAWARE SUPERMARKETS, INC.,	)	
Appellant,	)	C.A. No. N14A-07-015 RRC
v.	)	
THELMA JO DAVIS,	)	
Appellee.	)	

Submitted: February 4, 2015
Decided: April 29, 2015

On Appeal from a Decision of the Unemployment Insurance Appeal Board.

AFFIRMED.

ORDER

John W. Morgan, Esquire, Heckler & Frabizzio, Wilmington, Delaware, Attorney for Employer/Appellant, Delaware Supermarkets, Inc.

Dmitry Pilipis, Esquire, Legal Services Corporation of Delaware, Inc., Wilmington, Delaware, Attorney for Employee/Appellee, Thelma Jo Davis

Paige J. Schmittinger, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Attorney for the Unemployment Insurance Appeal Board.

COOCH, R.J.

This 29th day of April, 2015, on appeal from a decision of the Unemployment Insurance Appeal Board, it appears to the Court that:

1. Appellee Thelma Jo Davis was employed by Appellant Delaware Supermarkets Inc. from October 5, 2011 until her termination on March 11,

2014.[1] Appellee was terminated as a result of a customer complaint received on or about February 4, 2014 regarding an incident at the cash register where Appellee was working the day before.[2] Appellee engaged in a discussion with the customer that complained while Appellee was ringing up the customer's groceries.[3] Though Appellee maintains that she did not intend to upset or offend the customer, the customer submitted a complaint in which the customer claims that Appellee said "the country is such a mess because of people like [the customer] using food stamps."[4] Following her termination, Appellee filed for unemployment benefits but was disqualified from receiving benefits by a Claims Deputy. Appellee appealed the disqualification and was referred to the Appeals Referee for a determination of whether or not she was eligible for benefits.[5]

2. An Appeals Referee held a hearing on April 29, 2014 with Appellee and a representative of Appellant. On May 6, the Appeals Referee determined that Appellee had not been discharged from work for just cause and thus was eligible for benefits.[6] Because the customer who had complained was not present for this hearing, the Referee held that because "[t]he only evidence provided by the Employer at the time of the hearing in regard to the February 3, 2014 incident was hearsay," and further held that Employer had failed meet the burden of proof to satisfy the "just cause" standard.[7] The Referee's decision was timely appealed by Appellant to the Board.

3. The Board issued a decision upholding the Appeals Referee's decision on June 24, finding the evidence offered by Appellant during the Board hearing to be "substantially similar to that presented to the Referee." The Board found that "[w]ithout the testimony of the customer whose complaint resulted in Claimant's termination," Appellant failed to satisfy the burden of proof required to show that Appellee had been discharged for just cause.[8] Appellant timely appealed the Board's decision to this Court.

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[1] Division of Unemployment Insurance, Notice of Determination, R. and Tr. from the UIAB at 5, D.I. #7 (Oct. 3, 2014).
[2] *See* Division of Unemployment Insurance Appeals Referee's Decision, R. at 30.
[3] *See* R. at 22
[4] R. at 30; *See also* R. at 22-23, 30-31, 36.
[5] *See* Notice of Hearing, R. at 10.
[6] *See* Division of Unemployment Insurance Appeals Referee's Decision, R. at 29-32.
[7] *See* Referee's Decision, R. at 31-32.
[8] *See* Decision of the Unemployment Insurance Appeal Board on Appeal from the Decision of Dina M. Burge, R. at 47-49.

4. The issue before the Court is whether the Board erred when it found that Claimant had not been discharged for just cause. "Just cause," means a "willful or wanton act in violation of either the employer's interest, or the employee's expected standard of conduct."[9] This Court's review of an Unemployment Insurance Appeal Board decision is limited to a determination of whether the Board's decision was supported by substantial evidence and free from legal error.[10] Substantial evidence requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[11] It is within the province of the Board, not this Court, to weigh evidence or make determinations based on credibility or facts.[12] Reversal based on an abuse of discretion will occur only if "the Board 'acts arbitrarily or capriciously' or 'exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice.'"[13]

5. Appellant argues that it had just cause to terminate Appellee's employment, and further contends that the Referee and the Board committed legal error. Specifically, Appellant argues that the Referee and the Board incorrectly applied Delaware evidentiary rules regarding hearsay when the Referee and the Board found that the only evidence submitted by the Employer in support of the violation that led to Appellee's termination was inadmissible hearsay.[14] Rather, as Appellant claims, the "Shoprite Email Log Record" was admissible hearsay because it fell within the business records exception articulated in D.R.E. 803(6). Appellant's alternative argument (set forth in a footnote) is that if the log record was not a business record, it should be considered an excited utterance.[15] Appellant suggests that the Referee and the Board also erred when both failed to consider other direct evidence presented by the employer, particularly the testimony of Manager Sayers. Lastly, Appellant contends that the Board committed an error of law when it "relied on the Referee's erroneous conclusion to affirm."[16]

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[9] *Wilson v. Unemployment Ins. Appeal Bd.*, 2011 WL 3243366, at *2 (Del. Super. Jul. 27, 2011).
[10] *See Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del 1981).
[11] *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc*., 636 A.2d 892, 899 (Del. 1994) (citing *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981)).
[12] *See Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del 1965).
[13] *Straley v. Advanced Staffing, Inc.*, 2009 WL 1228572, at * 2 (Del. Super. Apr. 30, 2009) (internal citations omitted).
[14] *See* Appellant's Opening Br. at 11-17, D.I. #10 (Oct. 14, 2014).
[15] *See* Appellant's Opening Br. at 13.
[16] Appellant's Opening Br. at 17.

6. The Board, through counsel, has written to this Court, advising that 1) the Board declined to take a position as to whether Appellant had established just cause, but 2) asserted the Board's position with respect to whether the Referee and the Board had committed legal error by treating the Shoprite Hotline Email Log as inadmissible hearsay.[17] The Board's position appears in pertinent part below:

> The Board will, however, respond to Appellant's argument that the Board committed legal error by upholding the Referee's decision. Specifically, the Appellant asserts that "the UIAB committed reversible legal error by treating the Employer's February 5, 2014 Shoprite Hotline email log business record as inadmissible hearsay and by disregarding all direct evidence the employer provided."
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> Board Regulation 4.7 controls the Board's ability to admit and consider evidence. Board Regulation 4.7.1 indicates the Board follows the Delaware Rules of Evidence and gives the Board discretion to admit and consider hearsay evidence. Specifically, Board Regulation 4.7.3 states, "[t]he admissibility of evidence and determinations of the weight to be given evidence and the credibility of witnesses shall be within the sound discretion of the Board."
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> The document at issue is a "Shoprite Hotline Email Log." The Appellant asserts that the "Shoprite Hotline Email Log" is admissible under the business records exception. The Board disagrees with this argument; however, whether or not the document is admissible under D.R.E. 803(6) is inconsequential. The record at issue was admitted into evidence and considered by the Board. The Board concluded that the document showed that Shop Rite received and processed a complaint by a customer. Although they can still be considered by the Board, the contents of that customer complaint are hearsay (and would be inadmissible as they do not meet the self-authentication requirements of D.R.E. 902). The law is clear that decisions cannot be made on hearsay evidence alone.
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> The Appellant further submits that the Board disregarded all direct evidence the Employer provided. In support of this argument, Appellant submitted a bullet-point list of direct evidence presented to the Appeals Referee by the employer. All of the enumerated testimony was from Manager Sayers. Manager Sayers was not present and has no direct knowledge of the February 3, 2014 interaction that was the basis for a customer complaint. The only non-hearsay evidence that Manager Sayers can provide is: a "severe" complaint was logged against Claimant. While

[17] The UIAB declined to respond to Appellant's substantial evidence argument, writing that "a body acting in a judicial or quasi-judicial capacity has no cognizable interest in seeking to have its rulings sustained." Ltr. from Paige J. Schmittinger, Esquire at 2, D.I. #12 (Nov. 24, 2014) (internal citation omitted).

> she provided testimony that the comments toward the customer were "demeaning, offensive, and abusive" she has no direct knowledge of such comments, or even if they were actually made.
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> A submitted complaint to Shop Rite pertaining to the Employee, alone, is not an adequate showing of willful or wanton conduct. Moreover, there is substantial evidence in the record to support the Board's findings, and such findings are free from legal error. As this Court has recently stated:
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> > In an appeal from a decision of the UIAB, this Court's review is limited to a determination of whether there was substantial evidence to support the findings of the UIAB and whether the decision was free from legal error. Substantial evidence requires such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court does not weigh the evidence, determine questions of credibility, or make factual findings. Rather, when making factual determinations, the Court defers to the experience and specialized competence of the Board.[18]

7. Appellee agrees with the Board's assertion as to legal error, and argues that Appellant failed to satisfy its burden of proof by offering only hearsay evidence.[19] Appellee contends that the Referee was "well within her discretion" to accept Appellee's testimony over that of Manager Sayers, "especially . . . where the only account of events provided by [Appellant was] hearsay."[20] Moreover, Appellee submits that the Board's decision that she was discharged without just cause is supported by substantial evidence because the Referee properly found that the burden of proof was left unsatisfied by Employer.[21]

8. Turning first to the evidence presented, the Appeals Referee determined that the only evidence presented by the employer was hearsay, and the Board found that the testimony presented to it was "substantially similar" to that presented to the Referee. Appellant presented direct testimony by Manager Sayers and the customer complaint submitted to the Shoprite Hotline Email

[18] Ltr. from Paige J. Schmittinger, Esquire at 2 (quoting deJesus *v. City of Wilmington*, 2014 WL 1275362, at *1 (Del. Super. Mar. 31, 2014)). Appellant was served with the letter from the Board prior to filing its Reply, but did not comment on the Letter in its Reply. *See* Ltr. from Paige J. Schmittinger, Esquire, Trans. I.D. # 72852498.
[19] Appellee's Answering Br. at 12-13, D.I. #15 (Dec. 17, 2014).
[20] *Id*. at 14.
[21] *Id*. at 14-15, 20-21.

Log to the Referee. Excerpts from Manager Sayers' testimony presented by Appellant in its opening brief appear below:

- P. 7: Manager Sayers' testimony that the Claimant was "discharged for a pattern and a repeat offense in a customer complaint."
- P. 7: Manager Sayers' testimony that "a customer had logged a complaint and it was quite severe."
- P. 7: Manager Sayers' testimony that the Claimant's comments towards the customer were "demeaning, offensive, and abuse . . . . in direct violation of our company policy. This is the second issue of this type within a six month period."
- P. 8: Manager Sayers' testimony that "when we met with [the Claimant] she explained to us her side, but because it was the second time in our disciplinary action it was grounds for separation."
- P. 8: Manager Sayers' testimony that "We met with [the Claimant] on March 11 . . . When we asked her about [the February 2014 incident] she admitted to having a conversation with the customer. That she didn't mean it in the tone the way the customer took it."
- P. 9: Manager Sayers' testimony that "because this was the second offense of this nature it was what [were] grounds for separation."
- P. 10: Manager Sayers' testimony that "when we met with [the Claimant] she did admit to speaking her opinion, speaking her mind and we had counseled with her several times that this was unacceptable. And I don't understand why it continued with several warnings."
- P. 16: Manager Sayers' testimony "The reason that we're here is due to the customer complaint and the recurrence of it . . . . you've shown a pattern and you were counseled on it and disciplined accordingly and that is why we are here today . . . . We had asked that you please not use work as your forum to speak your personal beliefs."[22]

9. The above testimony makes clear that Manager Sayers had no direct knowledge of what occurred between Appellee and the complaining customer. Accordingly, the Court finds that the Board did not err in concluding that Manager Sayers' testimony pertaining to the interaction between Appellee and the customer was inadmissible hearsay.

10. Next, the Court turns to the question of whether the customer complaint was inadmissible hearsay. The Court disagrees with Appellant and finds that the customer complaint submitted to the Shoprite Hotline Email Log is not a business record, but rather, is inadmissible hearsay. Appellant argues that because "[b]usinesses are encouraged to conscientiously keep records when a customer complains . . . . [i]t naturally follows that these business records

[22] Appellant's Opening Br. at 16.

regarding customer complaints that then result in disciplinary actions are sufficiently reliable."[23] This argument is unavailing.

11. The Court finds that the customer complaint in this case lacks the hallmarks of trustworthiness required to be considered a business record under 803(6).[24] An out-of-court record of an act or event is admissible under the business records exception :

> (1) [I]f the record was "made at or near the time" of the act or event (2) "by, or from information transmitted by, a person with knowledge," (3) if the record is prepared and maintained "in the course of a regularly conducted business activity" and (4) if it was the regular practice of the organization to make a record of the act or event.[25]

This Court can exclude the record even if the above requirements are met where "the source of information or the method or circumstances of preparation indicate a lack of trustworthiness."[26]

12. Here, no testimony was presented by Employer to lay the proper foundation for admission of the customer complaint generated as part of the Shoprite Hotline Email Log under 803(6).[27] Even assuming *arguendo* that some testimony was presented beyond Manager Sayers' identification of the customer complaint itself, this Court finds that the record at issue lacks the hallmarks of trustworthiness required for admissibility under 803(6). The feedback submitted to the Shoprite Hotline Email Log is submitted by customers who are compelled by the type of service received to submit written feedback. Disgruntled customers, and even customers that receive exemplary service, might provide accounts of events that are exaggerated, misremembered, or otherwise lacking in reliability. The risk of unreliability tarnishes the trustworthiness of the customer complaint in this case. Accordingly, this Court finds the Referee, and in turn the Board, properly concluded that the customer complaint was hearsay evidence.[28]

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[23] Appellant's Opening Br. at 15.
[24] *See* R. at 36.
[25] *Brown v. Liberty Mut. Ins. Co.*, 774 A.2d 232, 238 (Del. 2001) (internal citations omitted).
[26] D.R.E. 803(6).
[27] *See* R. at 17-18. Manager Sayers merely identifies that a customer complaint was made and makes no attempt to testify as to its admissibility under 803(6).
[28] The Court also finds no merit to Appellant's alternative argument that the customer complaint should be admissible as an excited utterance under 803(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." D.R.E. 803(2). The aggrieved customer did not

13. The Board held that without the testimony of the complaining customer, Appellant had not satisfied the burden of proof, as findings of the Board cannot rest on hearsay evidence alone.[29] This Court agrees with the Board that the customer's testimony was necessary in this instance, but notes that while there may be situations in which a customer who complained might be required to testify before the Referee and/or the Board, this Court, by its holding here, does not suggest that a customer must testify in every case.

14. The Court finds that substantial evidence exists on the record to support the conclusion that Appellant failed to meet its burden of proof to show that Appellee was terminated for just cause. Based on all the foregoing, the Court is satisfied that the Board neither abused its discretion nor committed legal error. Therefore, the Board's decision is **AFFIRMED.**[30]

IT IS SO ORDERED.

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Richard R. Cooch, R.J.

oc: Prothonotary
cc: Unemployment Insurance Appeal Board

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make her complaint at the time of her interaction with Appellee. Rather, some time passed between the customer's visit to Appellant's store and the submission of the complaint. That, alone, is enough to place the customer complaint outside the reach of 803(2).

[29] 19 Del. Admin. C. § 1201-4.7.1; *See* Decision of the Unemployment Ins. Appeal Board on Appeal from the Decision of Dina M. Burge, R. at 47-49.

[30] This Court is not without some sympathy for an employer such as Appellant who, quite understandably, may not wish to cause aggravation to an already disgruntled customer by requiring the customer to appear, perhaps more than once, to a hearing regarding that employer's efforts to discharge an employee. However, in cases like this one with limited admissible evidence, requiring the customer to appear may nonetheless be necessary.