STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **DISTRICT COURT**

SIXTH DIVISION

TERRIN I. EDGAR	:	
V.	:	**A.A. 10-01**
DEPARTMENT OF LABOR AND TRAINING, BOARD OF REVIEW & A PLACE TO GROW	:	

AMENDED DECISION

GORMAN, J. In this case, plaintiff requests that the court reverse a decision of the Board of Review of the Department of Labor and Training which confirmed rulings made by the director of that department and a referee, both of whom found her ineligible for unemployment benefits because she was terminated for "proved misconduct" as defined in §28-44-18 of the Rhode Island general Laws, 1956. This court has jurisdiction under §28-44-52.

I. PROCEDURAL HISTORY AND FACTS

After the Director of the Department of Labor and Training denied Ms. Edgar unemployment payments, she appealed, and a hearing was held before a referee who confirmed that ruling. When she then appealed that decision, the

board of review adopted the findings of the referee and affirmed the denial. No further hearing was conducted by the board.

The referee found that the claimant had worked for this employer for 10 months. He also made the following findings of fact:

> During that period of employment [sic] the claimant developed an unsatisfactory attendance record as a result of absenteeism without proper notification. She was scheduled to work on June 5, 2009. The claimant did not report at her scheduled time. Instead she called the employer approximately one hour after her scheduled time to notify [the employer] that she would not be appearing because she had been assaulted. The claimant was initially informed she was being suspended for a three-day time period. It was the claimant's understanding that the dates of suspension were to be June 9, 10, 11, 2009 and that she would be expected back at work on June 12, 2009. The employer's understanding was that the suspension was to be June 8, 9 & 10, 2009 and due back on the 11th. Subsequently when the claimant did not report for work on June 11, 2009, but did report on June 12, 2009, she was notified she was terminated. The claimant alleges that she took the termination as being a layoff due to lack of work and filed a claim indicating that was her reason for unemployment.

Based on these findings, the referee concluded that through her failure to properly notify the employer that she would be absent on June 5, combined with her previous "infractions," (Referee's decision, p.2) the claimant had acted in a manner contrary with the employer's best interests, and her firing was for misconduct. The referee also determined that because Ms. Edgar misrepresented the reason for her unemployment, she was overpaid.

II. DISCUSSION

In order to reject a claim for unemployment benefits pursuant to §28-44-18, the employer must show that the worker was not merely

unsatisfactory, but that the actions of the employee went beyond incompetence or isolated acts of negligence.[1] The Rhode Island Supreme Court in Turner v. Department of Labor and Training, Board of Review, 479 A.2d 740, 741-741 (R.I. 1984) established the standard to be applied in cases where a person was fired for "proved misconduct." There, the court, quoting a Wisconsin Case, Said that actionable misconduct:

> "is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee or in carelessness or negligence of such degree or recurrence as to manifest evil culpability, wrongful intent or evil design, or show an intentional end substantial disregard of the employer's interest or of the employee's duties and obligation to his employer. On the other hand mere... ordinary negligence in isolated instances or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute."[2]

At the hearing before the referee, the employer testified that "at least two or three times prior" to the absence which resulted in her termination, plaintiff had failed to show up at work. Also, the day care involved needed to maintain a certain ratio of employees to children, and without Ms. Edgar's presence, it created a significant problem for the business. On each occasion, her supervisor discussed her absences with the plaintiff.

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[1] The statute reads in relevant part:

§28-44-18 Discharge for misconduct.- An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for...benefits.

[2] It is significant that after the Turner decision, the statute was amended to include the following:

> For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42-44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

Although the claimant testified that she understood that she was to return to work on June 12 after a three day suspension for being absent on June 5, the employer was specific in stating that she should return to work on June 11, and on that day, plaintiff was again absent without contacting her supervisor. It is clear from the referee's findings that to the extent that there were conflicts between the plaintiff's testimony and the witness for the employer, he believed the latter to be more credible.

This court when considering an appeal from an administrative tribunal, must defer to the hearing official on questions of fact and the weight to be given to fact witnesses. See §§ 28-44-54 and 42-35-15(g). However, in this case, it is obvious that one of the referee's conclusions is misleading. In explaining why he believed the case came within the provisions of § 28-44-18, the referee stated that:

> [t]he evidence presented establishes from the claimant's own testimony that she did not properly notify the employer of her intended absence on June 5, 2009. Her call was one hour after because she had overslept. That situation coupled with her prior infractions does constitute actions contrary to the employer's best interest. The termination resulting is under disqualifying conditions and benefits must be denied on this issue.

While it may be true that Ms. Edgar's failure to provide her employer with prior notice for her June 5 absence could be a basis for her termination and denial of benefits, that is not what the record shows happened here. Rather, the referee's findings of fact and the testimony and documents offered at the hearing, reflect that her unscheduled absence on June 5, merely resulted in a three day suspension. The plaintiff was fired only after she was again absent following the

period of suspension. The sole reasonable conclusion that can be drawn from the documents submitted to this court is that Ms. Edgar was terminated for failing to appear on June 11th – the day after her suspension ended.

While the inconsistency between the referee's factual findings and his conclusion is noteworthy, it does not fatally infect the administrative decision or require further action by the court. Based on a careful examination of the record in its entirety, the court finds there is substantial, probative evidence to support the rulings of the agency, and, therefore, the decision of the Board of Review is Affirmed.

Although it appears that the referee determined that plaintiff was told she was fired rather than "laid off," and there is some evidence to support that finding, the record also shows that plaintiff was informed that she could work in the future as a substitute. Because of this ambiguity and the absence of any specific discussion of the issue in the referee's decision, the question of overpayment is remanded to the Board for reconsideration.

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AMENDED JUDGMENT

Based on post-judgment information furnished by the parties, the December 30, 2010 judgment entered in this case is amended, and it is

ORDERED AND ADJUDGED

The decision of the Board as it relates to plaintiff's eligibility for unemployment benefits is affirmed, and the matter is remanded to the Board for reconsideration of the question of overpayment.

Dated at Providence, Rhode Island, this 14th day of January, 2011.

ENTER:

Walter Gorman

BY ORDER:

Melvin J. Enright
Acting Chief Clerk