STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Michelle Beauregard	:	
	:	
v.	:	**A.A. No. 10-0191**
	:	
Department of Labor & Training,	:	
Board of Review	:	

F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this administrative appeal Ms. Michelle Beauregard urges that the Board of Review of the Department of Labor & Training erred when it found her disqualified from receiving employment security benefits pursuant to G.L. 1956 § 28-44-18 of the Rhode Island Employment Security Act. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to G.L. 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review finding claimant disqualified from receiving benefits based on her termination from the employ of Supercuts is supported by substantial evidence of record and was not affected by error of law; I therefore recommend that the Decision of the Board of Review be affirmed.

FACTS & TRAVEL OF THE CASE

Claimant had been employed by Supercuts as a hair stylist for six years until she was discharged on March 31, 2010. She filed for unemployment benefits but on April 30, 2010 the Director of the Department of Labor & Training denied her claim, finding Ms. Beauregard had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on July 12, 2010 a hearing was held before Referee Stanley Tkaczyk at which the claimant and two employer representatives — appeared and testified. See Referee Hearing Transcript, at 1.

In his July 13, 2010 decision, the Referee made the following findings of fact:

> 2. FINDINGS OF FACT:
> The claimant had worked for this employer a period of six half years. At the time of hire, the claimant was informed of the employer's rules including attendance at mandatory training and meetings. The claimant had a recertification in February which she did not pass. Approximately mid-March, 2010, the claimant was informed that she had a mandatory training class scheduled on April 5, 2010 in the employer's Cranston location. The claimant worked in the Middletown location. In addition, during the conversation on March 31st, the claimant was informed that her employment status would be in jeopardy if she did not appear for the training class on April 5, 2010. The claimant notified the employer that she would not be appearing for that class because of an alleged anxiety attack which prevented her from driving [to] the location. The claimant inquired of other means of transportation and rejected those means as not being viable. By her refusal to attend the meeting, the claimant was in fact terminated.

Referee's Decision, at 1. Based on these findings, and after quoting the standard of misconduct found in section 28-44-18, the Referee made the following conclusions:

> * * * The weight of the evidence presented establishes that the claimant was discharged for misconduct, in specific, refusal to attend a mandatory training class. There has been insufficient evidence to establish that the claimant's refusal was for good cause or that the claimant had pursued and exhausted reasonable alternatives prior to placing herself in the extreme position of having her employment status terminated. Refusal to attend a training class does constitute insubordination and benefits must be denied on this issue.

Referee's Decision, at 2. Thus, the referee determined that the claimant was discharged under disqualifying circumstances within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 3. Accordingly, he affirmed the decision of the Director. Referee's Decision, at 3.

The claimant filed a timely appeal on July 28, 2010 and the matter was reviewed by the Board of Review. Then, on August 31, 2010, a majority of the members of the Board of Review affirmed the referee's decision, finding it to be an appropriate adjudication of the facts and the law applicable thereto and adopted the referee's decision as its own. See Decision of Board of Review, August 31, 2010, at 1. On September 27, 2010, Ms. Beauregard filed a complaint for judicial review in the Sixth Division District Court.

APPLICABLE LAW

Under § 28-44-18 of the Rhode Island Employment Security Act, "an employee discharged for proven misconduct is not eligible for unemployment benefits if the employer terminated the employee for disqualifying circumstances connected with his or her work." Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004). With respect to proven misconduct, § 28-44-18 provides, in pertinent part, as follows:

> For the purposes of this section, "misconduct" shall be 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 which is fair and reasonable to both the employer and the employed worker. * * * (Emphasis added).

The Rhode Island Supreme Court has adopted a general definition of the term, misconduct, holding as follows:

> " '[M]isconduct' * * * 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 equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or 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."

Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984)(citing Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 [1941]). In cases of discharge, the employer bears the burden of proving misconduct on the part of the employee in connection with his or her work. Foster-Glocester Regional School Committee, 854 A.2d at 1018.

STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under § 28-44-52. The standard of review is provided by G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> The court shall not substitute its judgment for that of the agency as to weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon lawful procedure;
> (4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The scope of judicial review by this Court is also limited by Gen. Laws 1956 § 28-44-54, which in pertinent part provides:

> The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules shall be conclusive.

Thus, on questions of fact, the District Court ". . . may not substitute its judgment for that of the agency and must affirm the decision of the agency unless its findings are clearly erroneous. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (citing § 42-35-15(g)(5)). The Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). "Rather, the court must confine itself to review of the record to determine whether "legally competent evidence" exists to support the agency decision." Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d at 363.

ANALYSIS

Ms. Beauregard was fired for refusing to attend a company educational program. Jennifer Salome, area supervisor for Supercuts, testified that claimant worked at their Middletown location. Referee Hearing Transcript, at 8-9. She explained that

Supercuts requires its stylists to be recertified each year. Referee Hearing Transcript, at 9. She explained that, in early 2010, claimant did not pass her recertification; as a result, arrangements were made for her to go to a class in April at the Cranston shop. Referee Hearing Transcript, at 9-10.

Ms. Salome testified that an employee's failure to attend such a class can result in discharge, as provided in the employee handbook. Referee Hearing Transcript, at 11-13 citing Employer's Exhibit 1, at 5, at ¶ 3. She indicated that when she spoke to Ms. Beauregard, who had previously attended such classes, the claimant said that she could not get a ride. Referee Hearing Transcript, at 10, 13. Ms. Salome indicated she knew about claimant's panic attacks and sight problems. Referee Hearing Transcript, at 17-18. Finally, she said management did not provide transportation. Referee Hearing Transcript, at 14.

Teena Smith, manager of claimant's salon, also testified. Referee Hearing Transcript, at 23 et seq. She indicated she told claimant she had to participate in the mandatory seminar about a month before. Referee Hearing Transcript, at 23-24. She related that claimant did not say she could not go. Referee Hearing Transcript, at 24. She conceded that Ms. Beauregard had been recertified each year. Referee Hearing Transcript, at 26-27. She indicated that on March 30, 2010 claimant indicated she could not drive to Cranston and was going to get a doctor's note. Referee Hearing Transcript, at 28-29. Claimant asked Ms. Smith what she should do. Referee Hearing Transcript, at 29.

At the hearing, Ms. Beauregard responded that she felt she was a good employee but had a sight problem at night and was having panic attacks. Referee Hearing Transcript, at 33. She indicated that she was told she would have to take a

four-hour class about two weeks prior. Referee Hearing Transcript, at 35. She said she didn't take the bus because the connections would have been difficult. Referee Hearing Transcript, at 37. Finally, she presented a Doctor's note to the Referee. Referee Hearing Transcript, at 44.

It is certainly true, as the Referee found, that one instance of insubordination can constitute misconduct. On this point I must respectfully disagree with the Member Representing Labor. Moreover, that her actions in this matter were an isolated instance was not claimant's defense to the charge of misconduct. To the contrary, the defense she interposed was that she could not attend the classes due to medical and psychological problems.

This defense was implicitly rejected by the Referee. Although the Referee focused on the fact that claimant had not explored alternative transportation options, which was an accurate finding, insofar as this issue was addressed in this record, it is hard to believe that the medical issue would not have been given greater deference, had it been proven satisfactorily.

But the medical issue was not properly raised. An employee interposing a medical justification for the performance or non-performance of any act must do so at the appropriate time. Claimant had not provided Supercuts with a medical excuse for her unwillingness to attend the meeting — and the note she produced at the hearing before the referee was deemed unpersuasive. Referee Hearing Transcript, at 44-45. She ultimately did provide a more persuasive note through counsel. This was too little, and very much too late.

On findings of fact and as to the weight of the evidence, this Court shall not substitute its judgment for that of the administrative agency. Substantial rights of the

claimant have not been prejudiced. Based on the above cited testimony and evidence of record demonstrating that claimant violated the employer's prohibition on sampling merchandise, I must find that the Board's decision that the claimant's conduct constituted "misconduct" under § 28-44-18 is supported by substantial evidence of record and was not clearly erroneous.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to deny claimant unemployment benefits under § 28-44-18 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g)(5)(6). Accordingly, I recommend that the decision of the Board be affirmed.

/s/
Joseph P. Ippolito
Magistrate

April 28, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Michelle Beauregard	:	
	:	
v.	:	**A.A. No. 10 - 0191**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 28th day of APRIL, 2011.

By Order:

/s/
Melvin Enright
Acting Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge