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

Judith Williams	:	
	:	
v.	:	**A.A. No. 10 - 194**
	:	
Department of Labor and 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 Board of Review's decision on the issue of complainant's disqualification is AFFIRMED.

Entered as an Order of this Court at Providence on this 27th day of November, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Judith Williams	:	
	:	
v.	:	**A.A. No. 2010-00194**
	:	
Department of Labor and 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. Judith Williams urges that the Board of Review of the Department of Labor and Training erred in denying her request to receive employment security benefits pursuant to Gen. Laws 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 Gen. Laws 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 is not clearly erroneous in light of the reliable, probative and 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

Ms. Williams was employed for eight years at Lifespan Corporation. Her last day of work was March 4, 2010. She filed a claim for employment security benefits on March 5, 2010 but a designee of the Director [of the Department of Labor and Training] denied the claim in a decision dated April 15, 2010 — based on a finding that claimant had been discharged for disqualifying reasons under Section 28-44-18 of the Employment Security Act. Director's Decision, at 1. The Claimant filed a timely appeal with the Department's Board of Review on April 21, 2010 and the matter was assigned to Referee Gunter A. Vukic for hearing.

On July 28, 2010 a hearing was held at which the Claimant and two employer representatives appeared and testified.[1] Referee Hearing Transcript — July 28 2010 at 1. In a decision dated August 5, 2010, Referee Vukic determined that the claimant was discharged under disqualifying circumstances within the

[1] It should be noted that counsel for the employer raised the argument in their memorandum of law that the claimant's representative at the hearing before Referee Vukic, a paralegal for Rhode Island Legal Services, should not have been allowed to represent the claimant at the hearing due to the fact that she is not a member of the Rhode Island Bar and is not a licensed attorney. However, it is clear that the Rhode Island Supreme Court has issued provisional orders allowing for the representation of persons before administrative boards and agencies by persons other than licensed attorneys. See Provisional Order No. 18, 454 A.2d 1222 (R.I. 1983) (Stating that a legal assistant may represent clients before administrative agencies or courts where such representation is permitted by statute or agency or court rules.) Furthermore, this forum is not the proper venue to challenge a practice authorized by the Rhode Island Supreme Court, especially since the merits of this argument were not addressed in the opinion below.

meaning of Section 28-44-18. Referee's Decision, at 3. The Claimant filed a timely appeal on August 18, 2010. Board of Review Decision, at 1. The Board of Review considered the matter and on September 2, 2010 a majority of the Board approved the Referee's findings and conclusions and adopted Referee Vukic's decision as their own. Id. The Member Representing Labor dissented. Board of Review Decision, at 2. Claimant then filed a timely appeal to this Court for judicial review.

At the July 28, 2010 hearing the Referee made the following findings of fact:

> The claimant worked as a Lifespan claims follow-up representative at the time of her discharge. The claimant completed her benefit plan election on or about October 22, 2009 for the effective January 1, 2010 plan year. She included her 21 year old daughter. The daughter resided with the claimant during 2009, was a full-time student in the Empire Education Group and pregnant at the time. December 9, 2009 the open enrollment dependent verification form was submitted along with a copy of the daughter's birth certificate and an August 3, 2009 Empire Education Group letter identifying the student, address, full-time enrollment and supporting detail.
>
> The student's attendance record reported limited attendance during the period between November 12, 2009 and November 24, 2009. The claimant's daughter attended class three of nine scheduled days. During the three days, she never completed the seven hour daily schedule. The last day of attendance was November 24, 2009. The school dropped the student effective December 10, 2009.
>
> An anonymous February 18, 2010 type-written letter from a "concerned employee" identified the claimant was bragging that she was getting benefits "for her daughter" in spite of the daughter having dropped to part-time and then completely out of school. An investigation was initiated. It was determined that the daughter last attended school November 24, 2009 and was no longer a

> student. The claimant denied knowledge of her daughter's status. During the four weekdays the daughter should have been attending school, the claimant would routinely leave before the daughter and return after classes had been completed. The claimant did not work the fifth weekday the daughter should have been in school.

Referee's Decision at 1-2. Based on these findings, the Referee made the following conclusion and affirmed the decision of the Director, determining that the Claimant was discharged for a disqualifying reason under § 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 3.

> **CONCLUSION:**
> * * *
> In the instant case, the claimant states she was unaware of her daughter's school status and that since she is 21 years old, the daughter is responsible for herself. However, the daughter resides with her mother and the claimant provided certification to the employer affording the daughter eligibility for employer provided medical benefits. Absent the February 18, 2010 employee letter identifying the health insurance abuse allegedly communicated by the claimant, it could well be found that the claimant was negligent but did not engage in willful, wanton actions against the best interests of the employer. However, no credible testimony has been provided to explain the accurate disclosure reflected in the letter or how such information could be obtained from anyone other than the claimant. Even the claimant's daughter would not necessarily have been aware of the details surrounding dependent coverage eligibility. Id. (Emphasis added).

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.

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 limited by G.L. 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

In cases of misconduct, the Employment Security Act places the burden on the employer to show that the claimant engaged in conduct that evinces "such willful and wanton disregard of an employer's interest as is found in deliberate violations 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." Turner, supra, 479 A.2d at 741-42.

In this case the employer urges that claimant Williams committed misconduct by deceiving it regarding her daughter's status as a student. Urging this behavior should be held to be misconduct, the employer cites Elmayan v. Board of Review of the Department of Employment and Training, 627 A.2d 324 (R.I. 1993). In Elmayan the Supreme Court held that making a material omission on an employment application — specifically, failing to reveal a prior employer who had discharged Mr. Elmayan for suspected theft — did constitute misconduct within the meaning of section 18. Elmayan, 627 A.2d at 326-27. Although not entirely inapt, I do not believe Elmayan is strong precedent. Quite frankly, the instant case is — in the abstract — a stronger case of misconduct. No financial loss was present in Elmayan. In the instant case, the employer suffered the expense of including her under its medical benefit package. In my view, it cannot reasonably be doubted that deceiving one's employer to its financial detriment constitutes misconduct. It is fraud, a form of theft. The only question is — was such fraud proven?

The employer clearly proved that claimant submitted a benefit form — on December 9, 2009 — indicating that her daughter was a student. Referee Hearing Transcript, at 38. The employer was also able to show that the daughter was discharged from her school on December 10, 2009, after not attending since November 24, 2009. In fact, this information was retrieved for the employer by claimant. Referee Hearing Transcript, at 25-27. Thus, the employer — for a time

— paid for claimant's daughter's medical coverage when it had no obligation to do so.

Nevertheless, Elmayan must be viewed as imposing a requirement of knowledge and intent: that claimant knew he was misleading his new employer was apparently uncontested. The misinformation was entirely within his ken. There was simply no issue of knowledge vel non. In the instant case, issue has been joined regarding Ms. Williams' knowledge (of her daughter's educational status) or lack thereof.

Certainly, such knowledge may well be inferred from the contents of the February 18, 2010 letter which the employer had received — and introduced into evidence. The anonymous author stated that Judith Williams told her that " … she is getting benefits for her daughter and her daughter is no longer in school she dropped out. She is not going to tell anyone because her daughter needs the benefits." See Exhibit 3. According to Referee Vukic, this evidence constituted the sole evidence of knowledge and intent presented in this case; indeed it was pivotal to his determination to deny benefits:

> Absent the February 18, 2010 employee letter identifying the health insurance abuse allegedly communicated by the claimant, it could well be found that claimant was negligent but did not engage in willful, wanton actions against the best interest of the employer.

Referee's Decision, at 3. To reiterate, according to the Referee, this hearsay letter was crucial to his decision; before this Court, claimant urges it was error to admit and give credence to such a document.

Of course, the Board of Review is not barred from receiving hearsay. See Gen. Laws 1956 § 42-35-18(c)(1)[Exempting the Board of Review from § 42-35-10's mandate that administrative hearings generally utilize the rules of evidence]. However, the letter is not merely hearsay, it is anonymous. It was not on any stationery or letterhead that would yield any information about its source nor did it contain any other symbol or seal that would give an indication of its reliability. Claimant denied making any such statements. Referee Hearing Transcript, at 55. Its author was not identified or subjected to cross-examination. In my view, it bore few indicia of trustworthiness. While the Board of Review has extremely broad discretion in determining what weight to place on hearsay evidence, its reliance on the February 18, 2010 letter was clearly questionable. But it was legitimate basis upon which Lifespan could undertake an investigation.

And Lifespan did make inquiries. Doing so, it was wholly unsatisfied by Ms. Williams' responses. The claimant testified that she did not become aware of the fact that her daughter had completely stopped attending classes or that her daughter had been dropped as a student by the school prior to receiving that information from the school on March 4, 2010. Referee Hearing Transcript, at 65. Lifespan was incredulous because, among other reasons, the claimant did not work on Fridays and therefore had the opportunity to discover that her daughter , who was apparently in the advanced stages of a pregnancy, had not been attending her classes on those days.

In addition, the Referee's decision seemed to turn on the fact that the claimant was not able to explain the factual contents of the letter. As a result, he found claimant's denials of any knowledge that her daughter had left school to be utterly incredible. After extensive reflection, I find that I must agree with this conclusion.

Putting aside all legal discussions of the form and extent of the proof proffered by the employer in this case, I find I must associate myself with those who are overwhelmed by incredulity at the notion that claimant did not know that her daughter's educational status had changed. As an employee of Lifespan who was availing herself of their benefits plan, she had a duty to keep herself informed of her daughter's educational status, and to inform the company of any change. No more could be expected of her — but no less. This duty, which I find inherent in the employer-employee relationship, Claimant failed to fulfill. Her failure to do so displayed a willful disregard for her employer's best interests and, as such, constituted misconduct within the meaning of section 28-44-18.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to deny claimant Employment Security benefits under § 28-44-18 of the Rhode Island Employment Security Act was supported by substantial evidence of record and was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Section 42-35-15(g)(4),(5).

Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

November 27, 2012