STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
DISTRICT COURT

PROVIDENCE, Sc.
SIXTH DIVISION

Mary Ann Mulholland	:	
v.	:	**A.A. No. 10 - 0198**
Department of Labor & Training, Board of Review	:	

ORDER

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 and the memoranda of counsel, 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 decisions of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 1st day of March, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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

Mary Ann Mulholland	:	
	:	
v.	:	**A.A. No. 2010 – 198**
	:	
Department of Labor and Training,	:	
Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In the instant complaint Ms. Mary Ann Mulholland urges that the Board of Review of the Department of Labor & Training erred when it held that she was not entitled to receive employment security benefits because she had been discharged for proved misconduct.

Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. This matter has been referred to me for the making for 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 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.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: For sixteen months Ms. Mary Ann Mulholland worked as an activities assistant and receptionist for the Laurelmead Corporation until June 2, 2009. She filed an application for unemployment benefits two days later. On July 28, 2009 the Director determined her to be disqualified from receiving benefits, pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since she was terminated for misconduct – *i.e.,* leaving work before the end of her shift.

Complainant filed an appeal and a hearing was held before Referee Nancy Howarth on September 8, 2009. On September 11, 2009, the Referee held that Ms. Mulholland was disqualified from receiving benefits because she was terminated for proved misconduct. In her written Decision, the referee found the following facts:

> The claimant was employed as an activities assistant and front desk receptionist by the employer. On June 2, 2009, shortly after she reported to work, the claimant informed her supervisor that she was upset with her schedule, since her hours had been reduced. She indicated that she was leaving. During the conversation, the claimant's supervisor stated twice that if the claimant left during her shift she would be terminated. The claimant left her supervisor's office. The executive director came into the area and realized the claimant was upset. He advised her to calm down and speak with her supervisor again. The claimant refused and left the building. The claimant was terminated that day by her supervisor for leaving work prior to the end of her shift.

Decision of Referee, September 11, 2009 at 1. Based on these facts, the referee came to the following conclusion:

* * *

> The burden of proof in establishing misconduct in connection with the work rests solely with the employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant left work prior to the end of her shift without authorization since she was dissatisfied that her hours was had been reduced. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, September 11, 2009, at 2. Claimant appealed and the matters were reviewed by the Board of Review. On October 1, 2009, the Board of Review issued a unanimous decision in which the decision of the referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the referee's decision was adopted as the decision of the Board. Decision of Board of Review, October 1, 2009, at 1.

Ms. Mulholland filed a complaint for judicial review in the Sixth Division District Court on October 27, 2009 which was denominated A.A. 09-167. Ultimately, Judge Pfeiffer of this court remanded the matter to the Board so that it could address a Motion to Permit Additional Evidence which had been filed. See Decision, Mary Ann Mulholland v. Department of Labor & Training Board of Review, A.A. 90-167, (Dist.Ct. 5/10/2010)(Pfeiffer, J.). In response to this remand order the Board of Review held a further hearing on August 18, 2010 and issued a further decision on September 10, 2010. In this further decision the Board denied claimant's motion to reopen.

II. APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

> **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 waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. 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.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, "misconduct," in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> '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 equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard 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.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

III. STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
>
> * * *
>
> (g) The court shall not substitute its judgment for that of the agency as to the 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 of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful 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.

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.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

---

1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

2 Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

3 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review,

IV. ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law.

V. ANALYSIS

The Board adopted the referee's factual conclusion that claimant had been fired for walking off the job before the end of her shift — and that doing so constituted misconduct. Ms. Mulholland never disputed the factual premise of this case — *i.e.,* that she left the Laurelmead's facility early on June 2, 2009; she does challenge the legal conclusion made by the department and the Board — that she committed misconduct by doing so. She has pointed to certain mitigating factors in support of her appeal which this court does not consider insignificant. At this point I shall review the testimony presented by both sides.

A. Review of the Testimony.

At the hearing before Referee Howarth, the employer presented three witnesses in its effort to satisfy its burden of proof on the issue of misconduct. The second, but the one most intimately involved in the incident was Sandra Miguel, Activities Director at LaurelMead. She described how on June 2, 2009 Ms. Mulholland was "very upset"; she came into her office and indicated that she needed more hours — that she could not survive on the hours she had received on

---

Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

the upcoming schedule. Referee Hearing Transcript, at 14. Ms. Miguel indicated that she told Ms. Mulholland she could not give her more hours, because the day she could have used her she was working in another department. Id. Claimant then started to cry. Referee Hearing Transcript, at 15.

Claimant then mentioned she had not received enough hours in reception either. Id. Ms. Miguel responded that was "Tessa's" department and that she should talk to Tessa. According to Ms. Miguel, they then arrived at the critical point in the incident:

> Um — Mary Ann told me I should just lay her off which I said to you earlier and uh — she told me she was going home. She couldn't — she didn't — you know — she said "I don't have enough hours. I'm going home." Never mentioned anything about a headache. And I said to her "If you leave, then you're fired." I had work for her to do um — and she said "Well I'm just leaving." And she left. And I said it to her twice. "Mary Ann, don't leave or less you're gonna be fired." And she just left.

Referee Hearing Transcript, at 15-16.[4] Thus, according to Ms. Miguel, claimant — upset about her hours being cut — walked off the job despite receiving a direct command not to leave and a direct warning of the consequences.

Ms. Miguel denied claimant mentioned not having slept the night before. Referee Hearing Transcript, at 16. She described Ms. Mulholland as being angry, not sad. Referee Hearing Transcript, at 17. She also indicated that she looked healthy. Referee Hearing Transcript, at 20. Ms. Miguel stated that claimant had

---

4 Ms. Tessa Costa, Administrative services Director testified briefly and indicated that she heard Ms. Miguel say — "Mary Ann if you leave, you're fired." Referee Hearing Transcript, at 21.

walked out before the end of her shift once before — in September. Referee Hearing Transcript, at 18-19.

After her confrontation with Ms. Miguel, claimant spoke to Mr. Craig Evans, Executive Director. Referee Hearing Transcript, at 8. She told him that she was upset about her lack of hours; she also related that Ms. Miguel had warned her that if she left she would be fired. Id. Mr. Evans advised Ms. Mulholland to calm down and speak to Ms. Miguel again. Referee Hearing Transcript, at 9. He denied that claimant mentioned that she had a headache or any other ailment. Referee Hearing Transcript, at 10. He then spoke to Ms. Miguel, who confirmed that she had warned claimant that if she left she would lose her position. Id.

Claimant testified that when she got to work on June 2, 2009 she logged on to her computer and waited for Ms. Miguel to finish a phone call. Referee Hearing Transcript, at 26. Once it was over, she protested her lack of hours in the new schedule and started to cry. Referee Hearing Transcript, at 27. Ms. Miguel then said — "Oh, are you gonna cry now.?" Id. This upset her further, especially in light of the fact that she had a headache because she didn't get a good night's sleep. Id. She then told Ms. Miguel — "I didn't sleep well. I have a terrible headache. I can't work like this." Id. When Ms. Miguel asked if she was quitting, she responded — "No, I'm just going home sick. I can't work like this." Id. Ms. Miguel then loudly stated if she left she would be fired. Id. Ms. Mulholland then proceeded out of the office and down the hall. Id.

Then, Mr. Evans came out of the Personnel Office and spoke to her. Id. Claimant told him she had just been fired. Id. She explained to Mr. Evans that she was not crying because she had been fired, but because she was sick. Referee Hearing Transcript, at 28. He told her to "... have a good cry and then go back to work ..." — but claimant declined, stating that she could not work for Ms. Miguel because she had just fired her. Id.

Finally claimant described her condition on the morning of June 2, 2009. Referee Hearing Transcript, at 30. She said she couldn't have worked because

> My head felt like it was gonna split open. My stomach was doing flip flops. I have anxiety issues in addition to the depression.

Referee Hearing Transcript, at 30. When asked if she told Ms. Miguel she was sick, Ms. Mulholland responded — "Absolutely" and clarified that she told her she hadn't slept well and woke up with a headache. Referee Hearing Transcript, at 30-31. She also testified she told Craig — *i.e.*, Mr. Evans — she was ill. Referee Hearing Transcript, at 31.

B. Application of Precedent to Ms. Mulholland's Circumstances.

The law by which this case is governed is well-settled in the District Court. The District Court has repeatedly decided that walking off the job before the end of one's shift has long been held to constitute misconduct, especially when the employee does so without notifying his or her supervisor. See Fearns v. Department of Employment Security, Board of Review, A.A. No. 81-212, (Dist.Ct.8/31/83) (Plunkett, J.)(Board found claimant not entitled to benefits where he walked off the job without notifying his supervisor after supervisor was unable to obtain needed

assistance for claimant — because firm was shorthanded). While in the instant case Ms. Mulholland did notify her supervisor, this is in a sense, worse. Her supervisor absolutely forbade claimant to leave and warned her that doing so would result in her termination. At this juncture an aura of insubordination is added to the issue of leaving early.

In support of her appeal claimant urges that she did not leave because of anger or pique that her hours had been reduced but because she was ill. Unfortunately, her testimony is — in this record — unsupported by medical evidence. See Dempsey v. Department of Employment Security Board of Review, A.A. No. 88-227 (Dist.Ct. 3/7/91)(DeRobbio, C.J.)(District Court affirms denial of benefits to claimant security guard who left post without authorization due to illness). The Board did not credit her assertions of illness.

C. Summary of Findings.

Pursuant to the applicable standard of review described supra at 5-6, the decision of the Board must be upheld unless it was, *inter alia*, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result.

Applying this standard of review and the definition of misconduct enumerated in Turner, supra, I must recommend that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection

with her work — leaving work before the end of her shift — is well-supported by the record and should not be overturned by this Court. There is no question that claimant left her workplace early on June 2, 2009. The only question is whether she did so in circumstances that were excusable, not evincing willful disregard of the employer's interests.

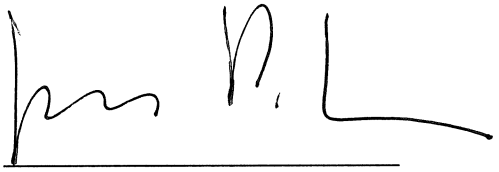
In finding her departure to be willful, the Board could well-rely on the following points. While claimant asserted that she went home because she was ill, she did not mention being sick to either Ms. Miguel or Mr. Craig — according to the sworn testimony given by each. Moreover, claimant did not present medical documentation of her illness. Finally, according to claimant's testimony, when asked by Mr. Craig to return to work, she declined; notably, she did not interpose her illness as the reason why she could not — responding instead that she couldn't work for someone who had just fired her. See Referee Hearing Transcript, at 28.

Based on the foregoing, the Board was certainly within its sound discretion to reject claimant's assertion of illness. Having done so, it was free to find that she walked off the job on June 2, 2009 in anger, in circumstances that showed a substantial disregard for the duty she owed to her employer to work her scheduled hours.

VI. CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review considered herein is not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, they are not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; nor are they arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

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



Joseph P. Ippolito
Magistrate

March 1, 2011