STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC **DISTRICT COURT**
SIXTH DIVISION

TRACY JOHNSON	**:**	
	:	
	:	
V.	**:**	**A.A. 2010-00199**
	:	
	:	
DEPARTMENT OF LABOR AND	**:**	
TRAINING, BOARD OF REVIEW	**:**	

JUDGMENT

This cause came on before Hastings, J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board is hereby reversed.

Dated at Providence, Rhode Island, this 2nd day of June, 2011.

ENTER: **BY ORDER:**

/s/ **/s/**

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE, SC **DISTRICT COURT**
SIXTH DIVISION

TRACY JOHNSON	:	
	:	
	:	
V.	:	**A.A. No. 6AA-2010-00199**
	:	
	:	
Department Of Labor And	:	
Training, Board of Review	:	

DECISION

HASTINGS, J. Ms. Tracy Johnson filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor & Training, which held that she was not entitled to receive employment security benefits pursuant to Gen. Laws 1956 § 28-44-18 based upon proved misconduct. It is alleged that the claimant, while an employee of University Gastroenterology, did not follow protocol by not calling a supervisor to report her absence on May 7, 2010 and failed to return the employer's telephone calls on that day. Jurisdiction for the review of decisions of the Board of Review is vested in this Court by Gen. Laws 1956 § 28-44-52. Employing the standard of review applicable to administrative appeals, this Court finds that the decision of the Board of Review is clearly erroneous; therefore, the Decision of the Board is hereby reversed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Claimant was employed by University Gastroenterology for four years and five months until she was terminated on May 7, 2010. Her last day of work was May 6, 2010. She filed a claim for Employment Security benefits and on May 8, 2010, the Director determined she was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-17 because she voluntarily left her job without good cause. Claimant filed an appeal and a hearing was held before Referee Nancy L. Howarth. In her decision issued on September 3, 2010 the Referee found the following facts:

> Claimant had worked for this employer a period of four years and five months. Her last day of work was May 6, 2010. The incident resulting in the claimant's termination occurred on May 7, 2010. Prior to that date claimant had received various warnings regarding not following office protocol and absenteeism. She was placed on notice that her employment status was in jeopardy by means of the final notice. The claimant did not punch in her timecard for the entire week beginning May 3, 2010, although she had worked all her scheduled hours. On May 7, 2010, the claimant failed to report to work, without notice to the employer. The office manager attempted to contact the claimant by telephone twice that day, with no response. She left voicemail messages; however, the claimant did not return her calls. The claimant was responsible for collecting patients' payments. She would then give the money to her supervisor. The claimant's supervisor left her job on Tuesday, May 4, 2010. The employer was unable to locate the weekly deposit on Friday that week. The deposit was never recovered. The claimant normally had many personal items on her desk, including photographs and a radio. These items had all been removed from her desk. The office manager found the claimant's office keys in her desk drawer. The claimant was terminated as of May 4, 2010 for failing to report her absence to the employer or return the office manager's calls. *Referee's Decision, September 3, 2010, at p. 1.*

Based on these findings, and after reciting the statutory and case law definitions of misconduct, the Referee arrived at the following conclusion:

* * *

> While the Director determined that the claimant left work voluntarily with good cause within the meaning of Section 28-44-17 of Rhode Island Employment Security Act, I find that she did not leave voluntarily. She was discharged. The Referee then determined that the employer sustained its burden in establishing misconduct. The credible evidence and testimony presented at the hearing establish that the claimant failed to contact the employer to report her absence on May 7, 2010 and failed to return the employer's telephone calls on that day.
> *Referee's Decision, September 3, 2010, at p. 2.*

As a result, the Director's decision was modified. The Referee determined that the claimant did not leave work voluntarily. Therefore, it was determined that she could not be denied Employment Security benefits under the provisions of Section 28-44-17 of the Rhode Island Employment Security Act. Rather, the Referee found that she was discharged for reasons of misconduct in connection with her work. Therefore, it was decided that she was subject to disqualification under the provisions of Section 28-44-18 of the statute. Accordingly, benefits were denied to claimant.

Claimant appealed again and the Board of Review undertook a further review of claimant's eligibility for benefits. On October 1, 2010, the Board rendered a unanimous decision in which it found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto.

Finally, Ms. Johnson filed a Petition for Judicial Review within the Sixth Division District Court on October 6, 2010.

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" which was drawn 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.

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

---

[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, 506, 246 A.2d 213, 215 (1968).

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.

ISSUE

The allegation of misconduct in the instant case centers on the assertion that on May 7, 2010 the claimant failed to contact the employer to report her absence and failed to return the employer's telephone calls on that day. Accordingly, the issue before the Court is whether such conduct, even if proven, is sufficient to disqualify her from receiving unemployment benefits pursuant to section 28-44-18?

ANALYSIS

My reading of the transcript of the hearing before the Referee and the other evidence produced in this matter leads me to the conclusion that the factual findings of

---

[3] Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

the Referee regarding claimant's failure to contact the employer to report her absence on May 7, 2010 is not supported by the record. However, it is undisputed that the claimant failed to return the employer's telephone calls on that day. The issue is, even if Ms. Johnson did not leave a message on that date, were her actions done willfully or in wanton disregard of the employer's interest and, therefore, constitute misconduct under the above Section of the Act? And, finally, whether or not benefits must be denied?

The Referee relied on the testimony of the employer's representative, Ms. Sampson, who testified that on May 7, 2010 there was no phone message from claimant. Ref. Tr. at 41. She also testified that she personally called her two times on that date but received no response. Ref. Tr. at 41. When the employer did not hear from Ms. Johnson by the end of the day, she sent out a termination letter. Ref. Tr. at 42. However, the claimant testified that she called at 6:00 a.m. and left a message at the Portsmouth site for the stand-in supervisor, Patricia. Ref. Tr. at 13. She stated that she called out due to an illness of her son. Ref. Tr. at 14. The claimant admits that she received two telephone calls from Ms. Sampson which she did not pick up until 10:00 p.m. because she had turned her phone off. Ref. Tr. at 16.

Although there was some testimony about the employer's concerns about Ms. Johnson's previous absences, this was the first time she was accused of not contacting the office regarding an absence from work. Ref. Tr. at 43. There was testimony regarding a missing deposit; however, the employer stated that that was not a reason for Ms. Johnson's termination. Ref. Tr. at 45. There was some testimony regarding an alleged pattern of not showing up on Mondays and Fridays. Ref. Tr. at 46. Clarification was sought by the Referee wherein she asked, "that was not the reason for termination?"

Ref. Tr. at 48. She follows up with the clarifying question of asking Ms. Sampson if failure to call on that day (May 7, 2010) without notice was the basis for the termination. Ref. Tr. at 48. The employer stated, "yes, that is correct." Id.

The issue is that the claimant alleges she called in and reported her absence via a telephone message that the employer denies receiving on May 7, 2010. It is undisputed that the claimant did not return the employer's two telephone calls on that date. The determination as to whether this is sufficient to justify a disqualification for misconduct is a more difficult question.

The Board made no findings as to whether these acts and omissions were done willfully or with a wanton disregard of the employer's interests, as required by the language of section 28-44-18 and the Turner decision, *supra,* pp. 4-5. The Referee found no evidence of willfulness or wantonness on the part of claimant. Based on my own review of the transcripts of the hearings held in this matter and the exhibits presented, I can detect no evidence of such recklessness on this record. It is undisputed that the claimant always called in her absences in the past. Accordingly, it cannot be determined on this record that these errors were made by the claimant with willful disregard of her employer's interests; thus, under the language of section 22-44-18 and the teaching of Turner, she cannot be disqualified from receiving benefits. Conduct which may justify termination does not, *per se,* disqualify a claimant from receiving unemployment benefits. *See* Harraka, *supra,* 98 R.I. at 200, 200 A.2d at 597, directing that a liberal interpretation shall be utilized in construing and applying the Employment Security Act.

The employer was certainly within its rights to terminate claimant. However, because the Board's decision departs from the definitions of misconduct found in section

28-44-12, this Court finds that the decision of the Board should be reversed and the claimant be deemed eligible for benefits.

CONCLUSION

Upon careful review of the evidence, this Court finds that the decision of the Board of Review was affected by error of law. *R.I. General Laws § 42-35-15(g)(3),(4).* Further, it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *R.I. General Laws § 42-35-15(g)(5),(6).*

Accordingly, the decision of the Board is hereby REVERSED.