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

Teresa Andrade	:	
	:	
v.	:	**A.A. No. 10 - 214**
	:	
Department 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 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 decision of the Board of Review is AFFIRMED.

Entered as an Order of this Court at Providence on this 27th day of May, 2011.

By Order:

___/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

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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. Ms. Teresa J. Andrade 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 based upon 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. 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; accordingly, I recommend that it be affirmed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Teresa Andrade was employed by Tasco Corporation as an assembly line worker for about three months until March 12, 2010. She

applied for employment security benefits and on April 21, 2010 the Director issued a decision that she was ineligible to receive benefits because she was discharged under disqualifying circumstances (*i.e.,* proved misconduct) in accordance with General Laws 1956 § 28-44-18. See Director's Exhibit No. 2.

Complainant filed an appeal, and a hearing was held before Referee Raymond J. Maccarone, Jr. on August 18, 2010 at which two employer witnesses appeared but the claimant failed to appear. In his August 26, 2010 Decision, the referee found the following facts:

> **2. Findings Of Fact:**
> The claimant had worked for this company for approximately eleven months full time on the first shift as an assembly line worker. The claimant had been experiencing attendance issues primarily absenteeism. The employer had indicated that this absenteeism on many occasions was without notice. On February 28, 2010 the claimant had been spoken to verbally concerning this issue. She was also given a handbook outlining policy which requires if you are out of work, especially for three days, a medical must accompany a return to work. The claimant had worked March 8, was out of work March 9, March 10 and March 11, 2010 without notification. The claimant returned to work on March 12 without medical documentation and was terminated for three consecutive days absent without notice.

Decision of Referee, August 26, 2010 at 1. Based on these findings, the referee arrived at the following conclusions:

> **3. Conclusion:**
> * * *
> In all cases of discharge, the burden of proof to show misconduct in connection with the work on the part of the claimant rests solely with the employer. This testimony, which is considered credible, along with the documentation presented reveals that the claimant was discharged for excessive absenteeism without proper notification to the employer which continued after warnings were issued. The claimant's actions in this matter contributed directly to her separation and as such

constitute misconduct rising to the level as defined above. Therefore, the claimant cannot be allowed benefits in this matter.

Decision of Referee, August 26, 2010 at 2. Accordingly, the referee found claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by the employee and the matter was reviewed by the Board of Review. In a decision dated October 4, 2010, the Board unanimously found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Assisted by counsel, Ms. Andrade filed her Complaint for Judicial Review in the Sixth Division District Court on or about October 27, 2010. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; 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 through a preponderance of evidence that the claimant's action, in connection with her work activities, constitutes misconduct as defined by law.

The particular ground of misconduct alleged in the instant matter, an unexplained absence from work, has been the subject of many prior District Court decisions. This Court has long held that unexplained absences may constitute misconduct within the meaning of section 18. See Williams v. Department of Employment Security, A.A. No. 82-162 (Dist.Ct. 9/30/83)(Higgins, J.); Blazer v. Department of Employment Security, A.A. No. 88-30 (Dist.Ct. 8/25/88)(Moore, J.); Audette v. Department of Employment & Training, A.A. No. 91-126 (Dist.Ct. 12/11/91) (DeRobbio, C.J.). These cases are in accord with the general rule accepted nationally. See 76 AM. JUR. 2d Unemployment Compensation § 89 (2005); Annot., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674.

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 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 and applying 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

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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 Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213 (1968).

3 Id.

expressed restrictions on eligibility under the guise of construing such provisions of the act.

ISSUE

The issue before the Court is whether the decision of the Board of Review 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. More precisely, was claimant disqualified from receiving unemployment benefits due to misconduct as provided by section 28-44-18?

ANALYSIS

As explained above, this Court has consistently held that absences from work — either because they are excessive in number or because they were without good cause or because they were unexplained — may be deemed to constitute misconduct within the meaning of section 28-44-18. The fact that the former employee had been warned that he or she was in jeopardy and continued to be absent is regarded as an aggravating factor. The instant case falls within this line of cases. Claimant, who had been warned that her absences imperiled her position, was absent for several days. While, in hindsight, we know that the reason for her final absence was humanly understandable and legally unassailable — i.e., the death of her brother — she was deemed disqualified because she failed to call-in to warn her employer she would be out.

This Court is bound by the record below. As mentioned above, claimant failed to attend the hearing held by Referee Maccarone on August 18, 2011. As a result, we only have the employer's version of events.

Mr. Mark Peloquin testified that he warned claimant orally concerning her absences before he went on vacation, on February 28, 2010. Referee Hearing Transcript, at 6-7. He indicated he specifically reminded her about calling-in if she was going to be absent, because Ms. Andrade failed to call-in repeatedly. Referee Hearing Transcript, at 8-9, 12, 14. Most pertinently, she was absent without calling-in on May 9, May 10, and May 11, 2010. Referee Hearing Transcript, at 14. When she came in on Friday, May 12, 2010 she worked the whole day and then was fired by Mr. Peloquin, who had just returned from vacation. Referee Hearing Transcript, at 15-16.

Whether claimant failed to appear for work or call-in are questions of fact. In this case the employer's testimony was uncontradicted. As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra p. 5 and Guarino, supra p. 5, fn. 1. The Member Representing Labor dissented from the Decision of the Board, finding that the testimony of the claimant to be more credible. His analysis may well be correct. However, the role of this Court is not to choose which set of testimony – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision is supported by substantial evidence of record.

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

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** 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.

Accordingly, the Board's finding that claimant failed to appear for work and failed to call in to explain her absences is supported by the record and cannot be successfully challenged.

The Board also applied the correct principle of law – that unexplained absences may constitute misconduct. See precedents cited supra page 4. There is no evident reason on this record why this longstanding rule should not be applied in this case. Thus, I find there is no basis for this Court to disturb the Board's decision denying benefits to Ms. Andrade.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

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

/s/
Joseph P. Ippolito
MAGISTRATE

MAY 27, 2011