STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC
SIXTH DIVISION

DISTRICT COURT

NAVIGANT CREDIT UNION	:	
V.	:	A.A. 10-23
DEPARTMENT OF LABOR AND TRAINING, BOARD OF REVIEW DANIEL SCOTTO	:	

JUDGMENT

This cause came on before Gorman, 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 affirmed.

Dated at Providence, Rhode Island, this 4th day of April, 2011.

ENTER:

Walter Gorman

BY ORDER:

Melvin J. Enright
Acting Chief Clerk

April 4, 2011

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DECISION

GORMAN, J In its complaint, the plaintiff seeks reversal of a decision of the Department of Labor and Training Board of Review which found a fired employee to be eligible for benefits under the Rhode Island Employment Security Act (Rhode Island General Laws, Title 28, Chapters 42-44). This court has jurisdiction under Rhode Island General Law 1956 §28-44-52.

I. PROCEDURAL HISTORY AND FACTS

After he was discharged by the plaintiff credit union, an employee sought unemployment benefits which were denied by the Director of the Department of Labor and Training based on a determination that he engaged

in misconduct and thus was ineligible under §28-44-18 of the statute. This decision was affirmed by a referee, but following a de novo examination by the Department of Labor and Training Board of Review, the claimant was ruled eligible for unemployment payments. A complaint was then filed requesting judicial review.

While an evidentiary hearing was conducted by the referee, no transcript of that proceeding was available, and, therefore, a hearing was held before the board of review. Based on an earlier ruling by a district court judge, the referee's findings will not be considered in this appeal.[1] The absence of this part of the record appears unimportant because there is no serious factual disagreement between the parties.

State law requires that "all employees" working at credit unions be bonded, §19-2-19. The company had arranged the requisite bonding through an insurance company, and that policy contained the following provision:

> **9. Termination Or Limitation Of Coverage For Employee Or Director**
>
> 1. This Bond's coverage for an "employee" or "director" terminates immediately when one of your "directors," officers or supervisory staff not in collusion with such person learns of:
>   a. Any dishonest or fraudulent act committed by such "employee" or "director" at any time, whether or not related to your activities or of the type covered under this Bond;

[1] It is this judge's understanding that during a conference with the parties, another judge of this court ruled that because the transcript was not available, the referee's decision would not be given any weight.

The employee worked at Navigant for three and one half years, and was covered under this bond.

Sometime about July 16, 2009, the chief security officer of the employer became aware that in February 2009, the claimant had pled nolo contendre to an embezzlement charge filed by the Smithfield Police Department. The criminal charge related to a part-time job with a different employer. When the managers of the credit union learned of this plea, they believed that the claimant was no longer covered by the credit union's general bonding contract, and he was terminated.

The evidence shows that the employee did not know state law required that he be bonded. Nor did he know about the relevant provision in the bonding agreement, or even that he was bonded. Although the referee made findings to the contrary, no testimony was presented at the de novo hearing before the board which suggests that he was aware of this requirement.[2]

II. DISCUSSION

The Rhode Island Employment Security Act in §28-44-18, addresses the issue of individuals dismissed for wrongful conduct. It states in relevant

[2] Director's Ex. 1 states that the claimant "would not have known about our policy on bondability itself because he did not have access to that policy, but he did give permission to the Credit Union upon hire that we could conduct a background check and credit check." (Entry for 09/11/09)

part that "[a]n individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for . . . benefits." In Turner v. Department of Employment and Training, Board of Review, the Rhode Island Supreme Court, quoting from a Wisconsin case, described the type of misconduct covered by the statute, saying that it:

> "Is limited to conduct evincing such willful or wanton disregard for a 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 evil 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 obligations to his employer. On the other hand mere . . . 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."

Even with this limited interpretation of the misconduct covered by §28-44-18, the credit union would appear to be justified in firing an employee who could no longer be bonded because he admitted embezzling funds from another employer, a crime which requires a specific intent. Given the nature of the criminal offense, the employee could not argue that he was merely negligent, careless or not competent. However, as is discussed below, the record in this case reflects that the termination was not based on criminal activity. The "misconduct" here was that he was no longer bondable.

The employer's concern was complicated by a statute requiring that "Every officer and employee of a regulated institution shall be bonded," §19-2-19, and a contract with the bonding company which says that the bond is "immediately" terminated for an employee who has committed "[a]ny dishonest or fraudulent act," Section 9. 1. a. of the bond agreement.

Certainly, given these circumstances, the employer can establish a compelling interest in acting promptly to ensure that it is complying with state laws, and that the credit union members' deposits are properly protected by insurance. The board's decision challenged in this suit is not inconsistent with those objectives. Instead, the board recognized that at the time the employee was discharged, his status had not yet changed. Despite any language in the bonding contract, the bond for the employee was not terminated as of July 21, 2009, the dated he was fired. While it may well be that as of July 16, when the employer learned of his plea in the criminal case, he was no longer "bondable," the bond insuring the activities of all Navigant employees remained in effect. He was actually covered by that bond.

In this case the parties and the board have focused on whether the employee was "bondable" at a specific time – the date he was fired. But that term describes the employee's ability to secure a bond if one were sought. It

does not determine whether the credit union was protected by its insurance policy at that time or whether by retaining him, it would be in violation of the state law which required all employees to be bonded. In fact, because of the operation of law, it is clear that the employee remained bonded on July 21, and, thus, the reason for discharging him was not valid.

Under Rhode Island law, the bonds covering employees of regulated institutions remain in effect until 30 days after the Director of the Department of Business Regulations has been notified of the bond's termination, § 19-2-19(b). The credit union officials relied on subsection (a) of this statute as a basis for dismissing the employee. They either knew, or should have known, that under subsection (b), the employee continued to be bonded when he was fired.

The existence of a contract provision declaring that the bond "terminates immediately" once the credit union officers learn of the employee's misconduct is not enforceable because it conflicts with state law. This specific issue was examined in Paradis v. Aetna Casualty & Surety Company, 796 F. Supp. 59, 62 (R.I. 1992), where the court, interpreting an earlier version of the stature requiring bonding of employees by regulated businesses,[3] said: "[a]lthough Aetna validly followed the terms of the bond

[3] The previous statute, § 19-5-23 (as amended by P.L. 1985, ch. 465, § 1), provided:

in notifying Heritage of the cancellation, those terms were subject to state law requiring notice to the DBR."[4] The opinion went on to find that the statutory notice requirement applied even though under Rhode Island law in effect at that time, only the regulated business, and not the bonding agency, was authorized to notify the Department of Business Regulation. Also, in the Paradis case, the bonding agreement pre-dated enactment of the statute.

While this court is not bound by decisions in federal courts, it is prudent and routine to consider the reasoning of those tribunals when presented with similar issues and facts. See, Shoucair v Brown University 917 A.2d 418, 426 (R.I. 2007). The wording of the current applicable statute, § 19-2-19, as it relates to the bond remaining in effect until 30 days after notice to the Director of the Department of Business Regulation is virtually identical to the law discussed in the federal court opinion. The analysis found in that case appears eminently sound, and it would be difficult to formulate a reasonable alternative interpretation for the statute in this case.

> As a condition of employment, every treasurer, assistant treasurer, officer, manager, or assistant manager of a . . . loan and investment company . . . and credit union . . . shall be bonded . . . The director of business regulation shall be notified of any change in the bond thereafter made, or any revocation of the bond within ten (10) business days of such a change or revocation by the . . . loan and investment company . . .or credit union... Said bond or bonds shall be continuous and remain in full force and effect until termination by either the institution or the surety. Such termination shall not become effective until thirty (30) days after the director of business regulation has received notice thereof.

[4] Paradise involved an alleged embezzlement of approximately $13 million by Joseph Mollicone, Jr., a defalcation which precipitated the collapse of the Rhode Island State credit union system.

In explaining its decision, the board of review mentioned that the employer was "unaware of any bonding issue," decision, p. 1, and the record shows that the credit union did not make a "formal" inquiry concerning the bond question until October. A written response from the insurer was dated December 30, 2009, [5] and another letter designed to provide "clarification" of the bond status was sent on January 26, 2010. Plaintiff's memorandum challenges the factual determination that it was ignorant of the bonding problem by arguing that the credit union was not only aware of this issue, it was the sole reason for firing him. Navigant Credit Union's Memorandum of Law, p. 4.

The board's choice of words may have been confusing. But the correctness of its decision finding the employee eligible for benefits is pellucid: he was dismissed for an improper reason. The employer, with some basis to believe the worker could no longer remain at the credit union, terminated his employment without fully understanding state law and how it limited the termination of bonds by insurance companies.

At some time subsequent to July 20, it seems extremely likely that the employee would lose his bonded status, but it had not yet happened when he

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[5] This letter is addressed to the employee, with no indication that a copy was sent to the credit union. However, the January correspondence states that the December letter was "previously provided" to the employer. (Interestingly, the latter letter advises the credit union that the bond coverage for the employer terminated on July 20 when Navigant officials learned of the nolo plea in the embezzlement case. It appears that neither party to the bond agreement fully understood the requirements of § 19-2-19.)

was let go (and as far as this record shows, still has not occurred). A company cannot fire someone because the person may become unemployable in the future. Cf., Christine Simone v. Department of Labor and Training, Board of Review, A.A. No. 08-41 (Dist. Ct. 9/12/0)(Ippolito, M.) (where an employee was found eligible for benefits after she was terminated in November for telling the employer that she planned to attend school in January).

III. CONCLUSION

Because plaintiff's reason for firing the employee was invalid, the decision of the board of review finding the employee eligible for unemployment benefits is correct, and it is affirmed.