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

| | | |
|---|---|---|
| **BBA Donuts Inc.** | : | |
| | : | |
| **v.** | : | **A.A. No. 10 - 242** |
| | : | |
| **Dept. of Labor and Training,** | : | |
| **Board of Review** | : | |
| **(Maura Denis)** | : | |

## JUDGMENT

**This cause came on before Isherwood 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 reversed.**

**Dated at Providence, Rhode Island, this 16th day of February, 2012.**

**Enter:** **By Order:**

**___/s/_____** **___/s/_____**

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| **(Maura J. Denis)** | : | |

# D E C I S I O N

**Isherwood, J.** This matter is before the Court on the complaint of BBA Donuts, Inc. seeking judicial review of a final decision rendered by the respondent Board of Review of the Rhode Island Department of Labor & Training, which found that Maura J. Denis was entitled to receive employment security benefits under the Rhode Island Employment Security Act. This matter has been referred to this Court for decision and this court has jurisdiction under Gen. Laws 1956 § 28-44-52.

## FACTS & TRAVEL OF THE CASE

The facts and travel of the case are as follows:

The claimant, Maura J. Denis, was employed for approximately two (2) years as a counter helper at BBA Donuts, Incorporated (BBA) – a franchise of Dunkin Donuts. Her last day of employment was June 9, 2010.

At about the time the claimant began working for BBA, she executed an acknowledgment on January 17, 2008 indicating that she had read and understood the company's employee guide. Said guide outlined the benefits and privileges for the consumption of store product by employees while working, which included:

> *While working an employee may consume the following at no cost. However, these products must be consumed while you are punched in to work, during your assigned break period. If you leave with the product, you must pay in full, regardless of how many bites you've already taken.*
>
> *Donuts*
> *Muffins*
> *Coffee, Tea, Iced Coffee*
> *Bagels with cream cheese (one per employee per shift)*
> *Coolatta, Dunkaccino, Hot Chocolate, Vanilla Chai*
> *Espresso, Cappuccinos, Lattes (Hot/Iced)*
>
> *The following must be paid for at all times:*
> *Flatbread/Any PM sandwich offerings*
> *Breakfast Sandwiches*
> *All bottled Beverages*
> *Bakery Products (i.e. brownies, cookies, etc.)*

The claimant thereafter worked for BBA until June 9, 2010 when she was discharged from her employment for disqualifying reasons under the provisions of Section 28-44-18 of the Rhode Island Employment Security Act.

The claimant filed her timely claim for unemployment benefits with the Rhode Island Department of Labor and Training. On September 14, 2010, the Director determined that the claimant had been terminated for misconduct within the meaning of Gen. Laws 1956 § 28-44-18 and was disqualified from receiving benefits. The claimant filed a timely appeal from the Director's decision. Referee Carl Capozza held a hearing on the matter on October 21, 2010 at which time claimant appeared with legal counsel. The employer appeared through a representative – the

store manager – and presented testimony as to the disqualifying circumstances leading to the discharge of the claimant.

On October 22, 2010, Referee Capozza issued a decision finding claimant ineligible to receive benefits because she was terminated for misconduct — to wit, by her unauthorized removal of company products in direct violation of a known employer policy. Decision of Referee, October 22, 2010, at page 2. The Director's decision was thereby affirmed. From this decision by the Referee, the claimant filed an appeal on November 2, 2010 and on November 19, 2010 there was a hearing with the Board of Review. By a majority vote, the Board issued a decision on December 2, 2010, in which it held that the claimant was discharged under non-disqualifying circumstances under the provisions of the Rhode Island Employment Security Act, Section 28-44-18. The Board concluded that although employer had a rule in place - with which the claimant was familiar – prohibiting the removal of store product, the employer failed to establish that the rule was uniformly applied. The Board thereby reversed the Referee's Decision finding that the claimant/employee was discharged under non-disqualifying circumstances. Thereafter, on January 13, 2011, the employer filed an Administrative Appeal with the Rhode Island District Court.

## 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.

## 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

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

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.

## ANALYSIS

This matter is before the Court after having wound its way through the appellate process within the Department of Labor and Training. Gen. Laws 1956 § 28-44-18 provides in part that an employee shall not be entitled to receive unemployment benefits if the employee as discharged for proved misconduct. In this matter, the Dunkin Donuts Employee Guide is clear and unambiguous in its outline

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

of rights and responsibilities with regard to category of "Meals", including but not limited to, when and what food product and/or beverage product an employee may or may not consume while at work. The claimant, Maura J. Denis, was made aware of the parameters of product consumption by management by way of her reading and acknowledging receipt of the employee warning. Moreover, claimant received an Employee Warning Notice on August 12, 2009 bringing to her attention, management's concern about prior violation of the Employee Guide with regard to giving out and consumption of store product. The claimant should have exercised heightened discretion thereafter. It is well-settled law that this Court is not authorized to substitute its judgment for that of the Board on factual matters. However, based upon the facts in this matter, this Court finds that the claimant did commit misconduct within the meaning of section 18 and that the Board's finding to the contrary is clearly erroneous and incorrect as a matter of law.

## CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to award unemployment benefits to the claimant was "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Gen. Laws 1956 § 42-35-15(g)(3)(4). Accordingly, this Court holds that the decision rendered in this case by the Board of Review is REVERSED.