STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C.

DISTRICT COURT
SIXTH DIVISION

MICHELLE R. BRYAN Appellant/ Employee	:	
	:	
VS.	:	A. A. No. 12-0005
	:	
DEPARTMENT OF LABOR AND TRAINING, BOARD OF REVIEW, (Dexter Credit Union), Appellee/ Employer	:	

JUDGMENT

This appeal came before Ovalles, J., on appeal from the Department of Labor and Training, Board of Review and, upon review of the record in its totality, a decision having been rendered, it is hereby,

ORDERED, ADJUDGED AND DECREED:

That the decision of the Board of Review is not supported by reliable, probative and substantial evidence of the whole record. Moreover, the Turner standard was improperly applied. Accordingly, the Board of Review's decision to affirm the Referee's decision is hereby reversed and, employment security benefits are to be awarded to the Appellant/ Employee.

Entered as an Order of this Court at Providence, Rhode Island on this 3rd day of December 2012.

ENTERED:

Rafael A. Ovalles,
Associate Judge

PER ORDER:

Stephen C. Waluk, Chief Clerk

Dated: 3 December, A.D., 2012.

STATE OF RHODE ISLAND

PROVIDENCE, SC.

DISTRICT COURT
SIXTH DIVISION

MICHELLE R. BRYAN
Appellant/ Employee

VS. : A.A. No. 12-0005

DEPARTMENT OF LABOR AND TRAINING, BOARD OF REVIEW, (Dexter Credit Union),
Appellee/ Employer

DECISION

OVALLES, J. This matter came before the Court on appeal, pursuant to R. I. General Laws § 42-35-15(a)[1], by Appellant/ Employee who was terminated for reasons of misconduct. The Director of the Department of Labor and Training found the Appellant/ Employee ineligible for employment security benefits under R. I. General Laws § 28-44-18. After a *de novo* hearing, a Referee again denied employment security benefits. In a two to one decision, the Board of Review affirmed the Referee's decision.

On appeal, Appellant contends that the Decision of the Board of Review was erroneous and should be reversed. The Appellant raises two issues: first, whether or not the Employer has met its burden of proof by a preponderance of the evidence based solely on hearsay evidence and, second, whether or not the Referee properly applied the Turner standard[2]. For the reasons that follow, the decision of the Board of Review is reversed.

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[1] Administrative Procedures, § § 42-35-1, 42-35-18.

[2] In Turner v. Department of Employment Security, Board of Review, 479 A. 2d 740 (R. I. 1984), the court held that "mere inefficiency, unsatisfactory conduct, failure in good performance as a result of the

FACTS AND PROCEDURAL HISTORY

Michelle R. Bryan (hereinafter Appellant and/ or Employee) was employed by the Dexter Credit Union (hereinafter Appellee and/ or Employer) for approximately twenty-seven (27) years. Appellant last worked on July 27, 2011. The Employee was terminated for reasons of misconduct, that is., insubordination.

The Director of the Department of Labor and Training ruled that the Employee's termination was for reasons of misconduct, and therefore, under disqualifying circumstances within the provisions of R.I.G.L. § 28-44-18 of the Rhode Island Employment Security Act. A Referee presided at a *de novo* hearing and again concluded that the Employee was terminated for reasons of misconduct, insubordination, thus disqualifying circumstances under R.I.G.L. § 28-44-18.

The Employee timely appealed the Referee's decision to the Board of Review. In a divided decision, without taking additional testimony and based on the record, the Board of Review affirmed the Referee's decision. Thereafter, the Employee filed a complaint for judicial review. Jurisdiction for review of the decisions of the Board of Review is vested in the District Court by R.I.G.L. § 28-44-52.

APPLICABLE RHODE ISLAND LAW

A. Standard of Review

The District Court has jurisdiction to hear appeals from the Board of Review pursuant to R. I. General Laws § 42-35-15(a). The District Court's jurisdiction is limited, however, by R. I. General Laws § 42-35-15(g), which states in pertinent part:

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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 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 the 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.

The District Court, therefore, lacks the authority to assess witnesses' credibility or to substitute its judgment for that of the Board of Review concerning the weight of the evidence on questions of fact. Link v. State, 633 A. 2d 1345 (R. I. 1993). The District Court is limited to a determination of whether the Board of Review's decision is supported by competent evidence. Nickerson v. Reitsma, 853 A. 2d 1202 (R. I. 2004); Marran v. State, 672 A. 2d 875 (R. I. 1996).

The District Court may reverse the decision of the Board of Review only where the decision "is clearly erroneous in light of the reliable, probative, and substantial evidence, or where it is arbitrary or capricious or that it is characterized as an abuse of discretion." Champlin's Realty Association v. Tikoian, 989 A. 2d 431 (R. I. 2010); Costa v. The Registry of Motor Vehicles, 543 A. 2d 1307, 1309 (R. I. 1988). Substantial evidence is that which a reasonable mind might accept to support a conclusion. Newport Shipyard v. R. I. Commission for Human Rights, 484 A. 2d 893, 897 (R. I. 1984). However, questions of law are not binding upon a reviewing court and may be freely reviewed to determine what the law is and its applicability to the facts. Champlin's Realty Associates,

989 A. 2d @ 432; Rossi v. Employees' Retirement System of Rhode Island, 895 A. 2d 110 (R. I. 2006).

Ultimately, the District Court is not entitled to substitute its judgment for that of the Board of Review on questions of fact "even in a case in which the court might be inclined to view the evidence differently and draw inferences different from the Board." Johnston Ambulance Surgical Associates, Inc. v. Nolan, 755 A. 2d 799, 805 (R. I. 2000). Simultaneously, the District Court has liberally construed and applied the Employment Security Act[3].

B. Rhode Island Employment Security Act/ Definition of Misconduct

Rhode Island General Laws § 28-44-18 defines misconduct and states in pertinent part:

> **Discharge for Misconduct**. – … For the purpose 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 provision 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.

The Rhode Island Supreme Court has addressed the termination of employment for proven misconduct. Turner v. Department of Employment and Training, Board of Review, 479 A. 2d 740 (R. I. 1984). In Turner, the Supreme Court adopted the general

[3] Eligibility for employment security benefits is to be determined in the light of the expressed legislative policy that "Chapters 42-44 of this title shall be construed liberally in aid of their declared purpose, which declared purpose is to lighten the burden that now falls on the unemployed worker and his or her family." R.I.G.L § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing that 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. Harraka v. Board of Review of Department of Employment Security, 200 A. 2d 595, 597 (R. I. 1964).

definition of the term misconduct that was expressed in Boyton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941), and stated:

> [M]isconduct ... is limited to conduct evidencing 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 employer's interest or 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, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

Appellee/ Employer has the authority to suspend and/ or discharge an Employee, especially where the suspension and/ or discharge is for proven employee misconduct. However, the Employer has the evidentiary burden of proving the Employee's misconduct by a preponderance of the evidence. The main issue in this case is whether or not the Appellant was terminated for reasons of proven misconduct.

DISCUSSION

Steven Angel (hereinafter Mr. Angel), President and CEO testified for the Employer. Mr. Angel provided the following testimony:

1.) That the Employee was an Assistant Branch Manager at the time of termination; she worked for the Employer for twenty seven (27) years. (Referee's Transcript, P. 7);

2.) That the Employee was terminated, because "[s]he was insubordinate." (Referee's Transcript, P. 8);

3.) That the Employee said, "that Mr. Smith [and] I were f--k--g a--h-l-s. She made that known to employees." (Referee's Transcript, P. 10);

4.) That the Employee "last worked on July 27, 2011." (Referee's Decision, P. 9);

5.) That the Employee said, "we could not be trusted; that we had lied to her" and, "that we were back stabbers." (Referee's Transcript, P. 10);

6.) That the Employee said, "I don't want to have this meeting" (referring to July 26, 2011)." (Referee's Transcript, P. 15);

7.) That the Employee said, "I don't want to have the discussion right now." (Referee's Transcript, P. 16);

8.) That the Employee "was very emotional at the time." (Referee's Transcript, P. 17);

9.) That the Employee "apologized." (Referee's Transcript, P. 22);

10.) That Mr. Angel did not witness the Employee express herself with profanity toward him or any other employee.

Richard Smith, President and CLO, (hereinafter Mr. Smith) testified for the Employer and provided the following testimony:

1.) That I "met with the Employee on July 26, 2011." (Referee's Transcript, P. 23);

2.) That the Employee made the comments on July 22, 2011;

3.) That the Employee said, "she was sick and tired of this place; that management s—k-d; and Richard Smith and Steve Angel were f—k—g ass-h---s." (Referee's Transcript, P. 23);

4.) That Mr. Smith did not witness the Employee use profanity toward him or direct insubordinate remarks to other employees;

5.) That on July 26, 2011, Mr. Smith attended the meeting with the Employee and Mr. Angel;

6.) That the Employee remained silent at the July 26, 2011 staff meeting;

7.) That the Employer presented an anonymously written statement from someone confirming that the Appellant had used profanity in the presence of subordinate employees.

The Employee provided the following testimony:

1.) That on July 22, 2011, the Employee was at the Central Falls premises;

2.) That the Employee was promoted and, she was supposed to get a pay raise; moreover, she never got the pay raise;

3.) That she was informed that the pay raise "was going to be up for reconsideration." (Referee's Transcript, P. 31);

4.) That after a probationary period, Employee's salary was to be increased to $ 45, 000. 00 per year, based on a 40-hour-week, not 35-hour-week;

5.) That the Employee came to realize that with a twenty minute commute and a 40-hour-week, she was not really getting a pay raise. (Referee's Transcript, P.P. 32-33);

6) That when the Employee asked for more money, Mr. Angel responded by giving her the silent treatment for a period of two weeks. (Referee's Transcript, P. 33);

7.) That the Employee felt that at times she was not being told the truth. (Referee's Transcript, P. 33);

8.) That the Employee admitted confiding in a co-worker that "she was sick to her stomach … because [she] d[id] not know what to expect and, that this conversation took place in a private office." (Referee's Transcript, P. 35);

9.) That the Employee denied using any profanity;

10.) That the Employee admitted in confidence to a co-worker that "I personally did not trust Richard [Smith]." (Referee's Transcript, P. 35);

11.) That at the meeting on July 26, 2011, the Employee cried, when informed that the pay raise would be reconsidered. (Referee's Transcript, P. 36);

12.) That in twenty-seven (27) years the Employee never received a written warning for any misconduct;

13.) That "Mr. Angel used profanity in the work place constantly." (Referee's Transcript, P. 42).

The Employee worked for the Employer for approximately twenty-seven (27) years. The Employee had been a Shop Steward for approximately ten years; recently, the Employee had been promoted to Assistant Branch Manager. On July 22, 2011, the Employee was excused from work; nonetheless, she went to her prospective work site at Central Falls to cash a check. While on the premises, the Employee allegedly confided to another employee that "senior management were untrustworthy and fuc---- ass-----." The Employee denied ever using profanity. This information was reported anonymously to Mr. Smith by a subordinate employee. After cashing the check, the Appellant left the premises.

On July 26, 2011, upon the Employee's return from vacation, in the late morning hours, the Employee was called to a meeting with Mr. Angel and Mr. Smith. At that meeting, the Employer informed the Employee that the pay raise would be up for re-consideration upon the Employee's transfer to the Central Falls location. The Employee became upset. She started to cry and, she wanted to leave and continue the meeting to

another time. Mr. Angel instructed the Employee to sit down and, the Employee remained at the meeting until Mr. Angel concluded the meeting. (Referee's Transcript, P. 16). At this meeting, there was no discussion about any alleged disparaging remarks, because neither Mr. Angel nor Mr. Smith knew of any disparaging remarks. (Referee's Transcript, P. 12).

On July 26, 2011, early evening, while at a staff meeting, the Employee remained silent and did not participate in the meeting. There was no evidence to show that the Employee was required to participate in any way at the staff meeting. After the staff meeting, Mr. Smith informed Mr. Angel that the former had learned some things earlier that same day that the latter would find very interesting. (Referee's Transcript, P. 12). Upon getting Mr. Smith's information and further discussions with other employees, Mr. Angel terminated the Employee, because the Employee had been insubordinate by remaining silent at the staff meeting and the disparaging remarks. (Referee's Transcript, P. 15).

Neither Mr. Angel nor Mr. Smith ever witnessed the Employee make any profane statements. No direct testimony was presented regarding the actual occurrences of the disparaging remarks. The Employer's sole evidence of the disparaging remarks was an anonymously written statement provided by a subordinate employee. This anonymously written statement is insufficient to prove this aspect of the case by a preponderance of the evidence. The evidence presented by the Employer does not establish that the Appellant made disparaging remarks. The anonymously written statement is hearsay evidence, though admissible, it is unreliable, non-probative and should be given little weight, if any

at all. DePasquale v. Harrington, 599 A. 2d 314, 316 (R. I. 1991); R.I.G.L. § 42-35-18(c)(1), and § 42-35-10.

Moreover, the Employer alleges that the Employee engaged in insubordinate behavior, because she did not want to continue with the meeting, did not continue to discuss her training, and she remained silent at the staff meeting. Nonetheless, the Employer admits that the Employee did in fact remain at the July 26, 2011, meeting when instructed to do so, even though she was emotional and at times crying. Second, the Employer of its own volition declined to discuss any Employee's training. Finally, the Employee's mere silence at the staff meeting was her last act of insubordination, even though no evidence was presented to suggest that the Employee had to make any type of presentation or participate in any discussion.

Regarding the three alleged acts of insubordination, even accepting the Employer's statements as true, after a review of the entire record, this court finds that the alleged behavior did not rise to insubordination that warrants termination for proven misconduct pursuant to R.I.G.L. § 28-44-18. The Employee's desire to leave a meeting, when she became upset and emotional, is simply a spontaneous reaction to a distressful event. Such behavior is far from deliberate and willful or a wanton disregard of an employer's interests. Secondly, the Employee's silence at a staff meeting, where no evidence was presented to prove that anything was required of her, on the same day that she was upset, is hardly insubordinate behavior.

Finally, there are the disparaging remarks, which even if true, this court finds were an isolated incident and, as such do not constitute deliberate and willful or wanton action against the Employer with a motivation to cause the Employer harm. A review of the

entire record does not demonstrate that there is substantial, probative and reliable evidence to support the findings of fact, conclusions and decision of the Referee, which were subsequently affirmed by the Board of Review[4].

CONCLUSION

The Referee's Decision was not supported by reliable, probative, and substantial evidence of the whole record. Moreover, the Turner standard was improperly applied. Accordingly, the Board of Review's Decision to affirm the Referee's Decision is hereby reversed and, employment security benefits are to be awarded to the Appellant.

Judgment filed simultaneously with this Decision.

[4] Archway, Inc. v. Department of Labor and Training, Board of Review, A. A. 01-03.