STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

EMILY KAUFFMAN	:	
	:	
v.	:	**A.A. No. 12-80**
	:	
DEPARTMENT OF LABOR AND TRAINING,	:	
BOARD OF REVIEW	:	

JUDGMENT

This cause came before Capraro 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 19th day of October, 2012.

Enter: **By Order:**

/s/ **/s/**

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DECISION

CAPRARO, J. This matter is before the Court on the appeal of Emily Kauffman (hereinafter "Claimant") from a decision of the Board of Review of the Rhode Island Department of Labor and Training (hereinafter "Board"). The Board, on March 22, 2012, affirmed the Decision of the Referee that specifically found that the Claimant was rightfully discharged for reasons of proven misconduct since the Claimant's actions were not in the best interest of the employer.

Facts and Travel

The Claimant worked for a company named Maxim Healthcare Services, Inc. Before starting on the job, she signed numerous pages of the employee handbook acknowledging she understood and presumably would follow the policies and procedures of the company as it pertained to workplace conduct. The company has normal weekly

meetings where everyone in the office attends. During those meetings a wide variety of conversations take place, including ordering supplies.

During one such weekly meeting the Claimant brought up an issue concerning some orders she felt needed to be filled. She directed those issues at Robert Velez. She had been cordially and nicely asking Mr. Velez for months to fill the orders. Transcript from the Board p. 19. Since Claimant felt that she was not getting any relief from Mr. Velez, she thought she could get Mr. Velez to act if she brought up the orders in this weekly meeting setting with others there.

It is at this point that the facts are in issue. Mr. Velez testified that the Claimant became hostile, raised her voice and started pointing her finger at him. She did this in front of everyone at the meeting. Claimant then told Mr. Velez he was an "incompetent little boy in a suit." Transcript p. 7. Claimant further told Mr. Velez "you suck, you suck at doing your job." Transcript p. 7. Claimant ended her tirade by telling Mr. Velez "I hate you, I can't stand you, you're a piece of shit." Transcript p. 7. As she uttered those words she was being asked by Mr. Velez to "check" herself, in other words to calm down. This scene at the meeting was corroborated by an independent witness, Casey Askeland. Claimant does not deny being upset and calling Mr. Velez an "incompetent little boy in a suit." She also admits to telling him she could not stand him. Transcript p. 20. Claimant denies swearing at Mr. Velez or telling him she hated him.

Both the Referee and the Board found that the credible testimony and evidence presented by the employer showed that the Claimant was terminated for disqualifying reasons. They both reasoned that the actions of the Claimant were not in the best interest

of the employer. They also found that such actions by the Claimant were a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

Standard of Review

This Court has the authority to review the Board's decision pursuant to R.I.G.L. 1956 § 28-44-52. The standard of review that this Court must apply is set forth in § 42-35-15 of the Rhode Island Administrative Procedures Act. See University of Rhode Island v. Department of Employment and Training, Bd. of Review, 691 A.2d 552 (R.I. 1997). Under § 42-35-15(g), this Court is empowered to affirm, reverse or remand an agency's decision. In conducting its review, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." § 42-35-15(g). This Court may only reverse or modify an agency's 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.

Judicial review of administrative action is "essentially an appellate proceeding." Notre Dame Cemetery v. Rhode Island State Labor Relations Board, 118 R.I. 336, 339, 373 A.2d 1194, 1196 (1977); see also Mauricio v. Zoning Board of Review of the City of Pawtucket, 590 A.2d 879, 880 (R.I. 1991).

When reviewing an administrative agency's factual findings, this Court "must uphold the agency's conclusions when they are supported by legally competent evidence on the record." Interstate Navigation Co. v. Division of Public Utilities and Carriers of R.I., 824 A.2d 1282, 1286 (R.I. 2003). Legally competent evidence has been defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." Town of Smithfield v. Churchill & Banks Cos., LLC, 924 A.2d 796, 806 (R.I. 2007) (quoting Foster-Glocester Regional School Committee v. Board of Review, 854 A.2d 1008, 1012 (R.I. 2004) (further citation omitted)). The term, "substantial evidence," is functionally equivalent to legally competent evidence. Town of Burrillville v. R.I. State Labor Rels. Bd., 921 A.2d 113, 118 (R.I. 2007). In short, if any agency has applied the law correctly and an examination of the record reveals that the agency's decision is supported by some credible or competent evidence, this Court shall not disturb the agency's determination.

Analysis

Rhode Island General Law § 28-44-18 provides, in pertinent part, that "[a]n individual who has been discharged for proved misconduct connected with his or her work shall become ineligible" for Employment Security benefits. The employer has the burden of proof in establishing misconduct. Under § 28-44-18, the employer must prove that the discharged party's actions constitute either (1) deliberate conduct in willful disregard of the employer's interest or (2) a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.

The standard for defining "misconduct" was provided by the Rhode Island Supreme Court in Turner v. Department of Employment Security, 479 A.2d 740, 741-42 (R.I. 1984), in which the Supreme Court quoted from Boynton Cab Co. v. Neubeck, 296 N.W. 636, 640 (Wis. 1940) as follows:

> "'[M]isconduct' . . . 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."

Further, it has been held that, while a reviewing court must defer to [the agency] as to factual findings, "whether or not those facts support a conclusion of misconduct is a question of law." Peterson Law Offices v. Murphy, 392 N.W.2d 319, 321 (Minn. App. 1986). Accordingly, this Court must determine whether claimant's actions rise to the level of misconduct.

In other words, the issue before the Court is whether the Board's determination that the Claimant was not entitled to receive employment security benefits under the discharge provisions of the Rhode Island Employment Security Act was supported by reliable, probative, and substantial evidence in the record. This Court must further determine whether said decision was clearly erroneous, or whether the Board committed an error of law.

With that as a background, the Court here is left to consider whether "one man's frankness is another man's vulgarity". After reviewing the record in its entirety, including the testimony at the hearing before the Referee, the Court finds that the Board did not act arbitrarily or capriciously when it upheld the decision of the Referee.

The evidence clearly shows that the Claimant deliberately stood and pointed at a person she needed to deal with in the company to order supplies. While standing and pointing the Claimant was verbally abusive to this person. While the Claimant denied the use of certain vulgarities, the testimony of Mr. Velez and the independent witness were believed by the Referee and their credibility upheld by the Board. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence. Certainly the language used by the Claimant is of such a type that it could be construed as a disregard for the employer's interest. Also, the Claimant was clearly on notice that such actions were not tolerated by the company. Indeed, at the hearing, the Referee accepted into evidence the employee's handbook. Transcript p. 7. In there, Claimant was made aware that the company did not tolerate hostile actions in the workplace nor did the company allow profane, abusive or threatening language against another employee, manager, customer or vendor.

Counsel for the Claimant in a well-written and unreciprocated memorandum argues that this is a classic isolated instance based on negligence under Turner v. Department of Employment Security, Board of Review, 479 A2d

740 (1984). Counsel argues that while his client's action warranted a firing, his client's actions were essentially an isolated "bad day" that do not warrant denial of benefits. Counsel also relies on Williams v. Brown, 157 So2D 237 (1963) wherein an employee was fired for fighting on the job but was still entitled to benefits since that fight was a single hotheaded incident.

The Court is not swayed by those cases. Claimant, who was on notice that her actions were not allowed by the company, deliberately waited until everyone was at the meeting to call Mr. Velez out on his inactivity. She thought exposing him would spur action. What does not make this an isolated incident is that the Claimant was repeatedly told to "check" herself after each line she uttered. She refused those commands and each time continued to yell vulgarities at Mr. Velez. It is certainly not the type of conduct that an employer has a right to expect. It is not in the employer's interest to be called out like that in front of the whole staff.

Recently in Advanced Communication, Inc. v. Department of Labor and Training, Board of Review, A.A. 12-045, this Court learned that the Board of Review has recently allowed benefits to an employee after that employee was fired for conduct/remarks at a staff meeting. In that case, the employee was encouraged to attend the meeting and voice his opinion. Here, the employee was encouraged to stop it.

Conclusion

This Court finds that the decision of the Board was not "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record", and that the decision of the Board was not "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." R.I.G.L § 42-35-15(g)(5)(6).

Accordingly, the decision of the Board is hereby affirmed.