STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Alexis Diaz	:	
	:	
v.	:	**A.A. No. 13 - 019**
	:	
Department of Labor and 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, the Court finds that the Findings and 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 Honorable Court at Providence on this 16th day of December, 2013.

By Order:

_____/s/_____
Stephen C. Waluk
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. In this case Mr. Alexis Diaz urges that the Department of Labor and Training Board of Review erred in finding him ineligible to receive unemployment benefits because he had been terminated for misconduct.[1]

Jurisdiction to hear and decide appeals from decisions of the Board of Review is vested in the District Court by a provision of the Employment Security Act[2] and the procedure that we follow in hearing such cases is that

[1] See Gen. Laws 1956 § 28-44-18.

[2] See Gen. Laws 1956 § 28-44-52.

prescribed in the Rhode Island Administrative Procedures Act.[3] Finally, I note that this matter has been referred to me as District Court magistrate for the making of findings and recommendations.[4]

For the reasons stated below, I conclude that the decision issued by the Board of Review denying benefits to Mr. Diaz is not clearly erroneous in light of the evidence of record and the applicable law; I therefore recommend that it be AFFIRMED.

I

FACTS AND TRAVEL OF THE CASE

Mr. Alexis Diaz's nine years of employment by Falvey Linen Supply Company ended on August 12, 2012, when he was fired. Claimant filed for unemployment benefits the next day but on November 13, 2012, a designee of the Director of the Department of Labor and Training found him ineligible to receive benefits,[5] a decision from which Mr. Diaz appealed. As a result, a hearing was scheduled before a referee employed by the Board of Review on November 1, 2012. Claimant appeared with counsel; three representatives and

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[3] See Gen. Laws 1956 § 42-35-15(g).

[4] See Gen. Laws 1956 § 8-8-8.1.

[5] See Claimant Decision, November 13, 2012 — Exhibit D2A.

counsel appeared for Falvey Linen. In his decision issued on November 2, 2012, Referee Gunter A. Vukic, made the following Findings of Fact regarding claimant's separation:

> **2. FINDINGS OF FACT:**
> * * *
> The claimant was a nine year Falvey Linen Supply Company employee. Claimant is Hispanic and part of one of the 26 different nationalities working at Falvey Linen Supply Company. A new employee of approximately one week is Iranian; a nationality already represented working within the company. On Friday, August 17, 2012, the new employee went to the human resource department and complained that the claimant repeatedly referred to him as a terrorist and made comments associated with explosives/bombs. Employer confirmed that the claimant made such statements. At least one confirmation was offered that the new employee asked the claimant to stop making the references. The claimant received an August 2009 warning for telling a coworker he better watch out and a recent June 15, 2012 final warning for making a threatening remark to a coworker. Claimant was discharged after the confirmation of his behavior toward the new employee.

Referee's Decision, November 2, 2012, at 1. Based on these findings — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading Rhode Island case interpreting section 18 — Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee concluded that misconduct had not been proven because, although Claimant had made inappropriate statements, an intent to be offensive had not

been shown.[6] And so, although Referee Vukic found Claimant Diaz had shown "poor judgment," his actions did not disqualify him from receiving unemployment benefits.[7]

After Falvey Linen filed an appeal the Board scheduled a new hearing on January 7, 2013. With a similar cast in attendance, the members of the Board of Review announced that they would rely on the record of the proceedings previously taken as supplemented. In its decision issued on January 25, 2013, the Board made the following Findings of Fact:

> The Referee's Findings are **affirmed** and incorporated into this Decision as if fully set forth herein; provided, however the Board makes the additional following findings.
>
> The Claimant had been employed as a multi-tasked machine operator. A recently hired (of one week) worker, of foreign origin, complained to the employer that the claimant had called, or referred, to him in a derogatory manner on a number of occasions. The employer conducted an investigation of the allegations made by the complaining worker. After the investigation, the employer informed the claimant that he was being terminated. The claimant had been warned on June 15, 2012 that he was not to engage in conduct which would make the workplace an unsafe environment. The employer determined that the claimant's actions toward the new employee compromised the safety of the workplace. The employer terminated the claimant from his job. (Emphasis in original).

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6 Referee's Decision, November 2, 2012, at 2-3.

7 Referee's Decision, November 2, 2012, at 3.

Board of Review Decision, at 1-2. Based on these supplemented findings, the Board formed the following Conclusions:

> As set forth in the Referee's Decision, the issue is whether the claimant's separation was for disqualifying reasons under Section 28-44-18 of the Act. At the hearing before the Board, the employer presented the testimony of additional witnesses. The additional testimony focused on the frequency of the remarks and corroborated the complaining worker's statements. There is conflicting testimony in the record as to what was said and how many times the claimant made the statements. The Referee concluded that repeated remarks were made, we affirm this conclusion. Viewing the testimony before the Board and Referee, we **affirm** the Referee's conclusion that the claimant thought he was being funny in his remarks. Although the claimant's remarks may have been believed by him to be funny or joking around, we conclude that he intentionally made the remarks; without regard to the effect his joking around might have on the safety of the work place or on the co-worker. We **reject** the Referee's conclusion that the utterances were unintentional. The claimant's testimony that he made no remarks or, one remark, is not credible, in view of the testimony contained in the record. The claimant's actions were deliberate in willful disregard of the employer's interest. The employer has proved misconduct. (Emphasis in original).

Board of Review Decision, at 2. Accordingly, the Board of Review reversed the Decision of the Referee and found Mr. Diaz ineligible to receive further benefits.[8]

Finally, on February 1, 2013, Mr. Diaz filed a complaint for judicial review in the Sixth Division District Court. A conference was held on this case

[8] Board of Review Decision, January 25, 2013, at 2.

on March 27, 2013 and a briefing schedule set. Helpful memoranda have been received from both Appellant Diaz and Appellee Falvey Linen Supply.

II

APPLICABLE LAW – DISQUALIFICATION FOR MISCONDUCT

Under § 28-44-18 of the Rhode Island Employment Security Act, "an employee discharged for proven misconduct is not eligible for unemployment benefits if the employer terminated the employee for disqualifying circumstances connected with his or her work."[9] With respect to proven misconduct, § 28-44-18 provides, in pertinent part, as follows:

> For the purposes of this section, "misconduct" shall be 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 which is fair and reasonable to both the employer and the employed worker. * * *

The Rhode Island Supreme Court has adopted a general definition of the term "misconduct," holding as follows:

> " '[M]isconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in

[9] Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

> 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 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, 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."

Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984) citing Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). In cases of discharge, the employer bears the burden of proving misconduct on the part of the employee in connection with his or her work.[10]

Historically, for a claimant's behavior to be defined as misconduct under section 18, it had to be inherently evil or wrong — "deliberate conduct in willful disregard of the employer's interest." Gen. Laws 1956 § 28-44-18, quoted supra at 5. Under this provision, all types of bad behavior in the workplace have been found to constitute disqualifying misconduct — conduct

[10] Foster-Glocester Regional School Committee, supra, 854 A.2d at 1018.

that would also be criminal, such as theft and assaults, and other patently offensive behavior, such as insubordination.

However, in 1998 the legislature broadened the definition of misconduct to include the violation of a uniformly enforced work rule.[11] Now, misconduct may be alternatively defined as "… a knowing violation of a reasonable and uniformly enforced rule or policy of the employer."[12] Thus, proved misconduct may now consist of — (1) traditional misconduct, as defined in Turner, and (2) the intentional violation of a work rule.

III

STANDARD OF REVIEW

The standard of review applicable in this case is that provided in Gen. Laws 1956 § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

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[11] See P.L. 1998, ch. 369, § 3 and P.L. 1998, ch. 401, § 3.

[12] See § 28-44-18. In other words, misconduct under section 18 now includes within its ambit behavior that would be fairly regarded as patently offensive and conduct that would not be, so long as it is prohibited by an office rule that has been uniformly enforced. The two forms of misconduct can be analogized (roughly to be sure) to the division of crimes into those that are considered malum in se (inherently wrong) and those described as malum prohibitum (unlawful because they have been proscribed by an act of the legislature).

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.' "[13] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[14] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[15]

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[13] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

[14] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

[15] Cahoone v. Board of Review of the Department of Employment Security,

The Supreme Court of Rhode Island directed in Harraka v. Board of Review of Department of Employment Security (1964),[16] 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 expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV

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.

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104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review of the Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

More precisely, was Claimant Diaz properly disqualified from receiving unemployment benefits because he was discharged from his position for proved misconduct pursuant to § 28-44-18?

V

ANALYSIS

As stated above, the Board of Review found that Claimant Diaz was discharged for proved misconduct. In order to evaluate the propriety of the Board's finding of disqualification, we shall begin by summarizing the testimony elicited at the hearing before the Referee and the hearing before the Board.

A

Misconduct — The Factual Record.

1

The Proceedings Before the Referee

The first witness presented at the hearing conducted by Referee Vukic by Falvey Linen in opposition to Mr. Diaz's claim for benefits was Katelin O'Hara, the employer's Human Resources officer.[17] She began by stating she

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[16] 98 R.I. 197, 200, 200 A.2d 595, 597 (1964).

[17] Referee Hearing Transcript, at 12 et seq.

knew Mr. Diaz from her days on the production floor and, although she was able to communicate with Mr. Diaz in English and Spanish, she would not describe him as being fluent in English.[18] Ms. O'Hara also indicated that Mr. Diaz had previously (on June 15, 2012) been the subject of a final warning — for threatening to meet another employee outside after work.[19] With this background established, her attention was turned to the incident in question.

On Friday, August 17, 2012, a new employee named Mohammed Fallahiye (on his first week on the job) told her he felt harassed, because Alex Diaz had called him a "terrorist" several times, and he would not stop.[20] As a result, she undertook to investigate the matter.[21] With the assistance of an employee named Millie Givens, she began by interviewing employees (four or five) and confirmed that Claimant had made the statement "several times on several days."[22]

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[18] Referee Hearing Transcript, at 13, 24. She said she spent nine months in production. Id., at 24.

[19] Referee Hearing Transcript, at 18.

[20] Referee Hearing Transcript, at 15.

[21] Referee Hearing Transcript, at 16.

[22] Referee Hearing Transcript, at 16. One of these witnesses was a man named Fiaru Baru. Referee Hearing Transcript, at 17.

She then spoke to Mr. Diaz, who admitted he had said these things but claimed he was only joking.[23] And as a result of her findings, she decided that — in light of his prior warning and this new harassment allegation — "We had no alternative but to separate him from the company because we have an obligation to provide a safe work environment for all our employees."[24] And so, Mr. Diaz was discharged.[25]

On cross-examination, she stated that, when she was on the production floor, she did not observe Mr. Diaz giving any of his co-workers a hard time.[26] And she indicated that people from 26 countries comprise the Falvey Linen workforce, although she could not break down the nationalities of the 30 employees who worked on the first shift with Claimant.[27] Mohammad, she said, speaks English at Falvey Linen.[28]

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[23] Referee Hearing Transcript, at 19-20.

[24] Referee Hearing Transcript, at 18. In addition, the parties stipulated that the Falvey Linen employee manual includes a provision, provided to Mr. Diaz in Spanish, which bars threats, intimidation, and harassment from the workplace. Referee Hearing Transcript, at 20-22.

[25] Referee Hearing Transcript, at 19-20.

[26] Referee Hearing Transcript, at 24.

[27] Referee Hearing Transcript, at 26.

[28] Referee Hearing Transcript, at 25. According to Ms. O'Hara, he also speaks

Ms. O'Hara conceded that Mr. Beru was the only witness hearing the comments whose name she included in her contemporaneous notes.[29] She explained that other employees declined to sign statements and said that Mr. Diaz was joking; she gave a gentleman named "Bob Lawler" as an example.[30] When asked for details as to how the word terrorist was used by Claimant, she responded that Mr. Fallahiye quoted Mr. Diaz as saying — "to not bring his bombs to work, and, um to not let his bombs off here."[31]

Next, the employer called Mr. Mohammad Fallahiye to the stand.[32] He said that on his first day of work, Monday, August 13, 2012, someone called him by name; then, Mr. Diaz said, in English:

> … Your name is Mohammad? You (inaudible) bomb (inaudible)? Do you want to (inaudible) the bomb over here? Are you terrorist? You bomb, bomb, bomb? I tell him, no, I'm not terrorist. What – what's (inaudible)? I (inaudible), actually, 'cause, uh, I didn't have (inaudible) this country when I came. But, uh,

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Arabic and Farsi. Id.

29 Referee Hearing Transcript, at 27.

30 Referee Hearing Transcript, at 28. Mr. Lawler also told Ms. O'Hara that Claimant would pretend he was blowing up bombs. Referee Hearing Transcript, at 33, 35.

31 Referee Hearing Transcript, at 31.

32 Referee Hearing Transcript, at 43.

> and I felt harassment and intimidated at the time and, uh, he continued – – [33]

According to Mr. Fallahiye, these comments were stated more than once on his first day and nine or ten times in a three-day period.[34] A bomb was also mentioned six or more times.[35] Mr. Fallahiye said a lot of people heard Mr. Diaz's comments.[36] He also tried to explain to him that he had a political issue with his government and he was not a terrorist.[37] He told him to stop (six or seven times); and he warned Mr. Diaz that he would tell the office.[38] And when he informed Mr. Diaz that he had told the office what he had been saying, Mr. Diaz said — "I am sorry. I don't mean — I play, uh, I play with you (inaudible)."[39] These comments were also made in English.[40]

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[33] Referee Hearing Transcript, at 45, 47-48.

[34] Referee Hearing Transcript, at 45.

[35] Referee Hearing Transcript, at 48-49.

[36] Referee Hearing Transcript, at 47. He testified, on cross-examination, that Bob and Mr. Beru told him to stop the comments. Referee Hearing Transcript, at 58.

[37] Referee Hearing Transcript, at 48.

[38] Referee Hearing Transcript, at 46-47.

[39] Referee Hearing Transcript, at 46.

Mr. Fallahiye told the Referee that, after Mr. Diaz's termination, he saw him a Walgreen's store.[41] Mr. Diaz made comments which, if true, can be fairly characterized as being threatening in nature.[42] As a result, he reported the incident to the Providence Police, albeit more than 10 days later.[43]

Finally, the employer presented the testimony of Miss Givens, Falvey Linen's Director of Human Resources, regarding the events of August 17, 2012.[44] She said Mr. Fallahiye reported to her and Ms. O'Hara, in a 10 to 15 minute meeting, that since his first day Mr. Diaz had been calling him a terrorist, that Mr. Diaz would not stop despite Mr. Fallahiye's requests that he do so, and that he was not a terrorist but a person here under the aegis of the International Institute.[45]

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[40] Referee Hearing Transcript, at 49.

[41] Referee Hearing Transcript, at 50.

[42] Referee Hearing Transcript, at 51.

[43] Referee Hearing Transcript, at 52-53.

[44] Referee Hearing Transcript, at 65 et seq.

[45] Referee Hearing Transcript, at 66-68.

Ms. Givens spoke to several employees, and they confirmed that Claimant had called Mr. Fallahiye a terrorist.[46] She sent for Mr. Dias and, in a meeting with her in Spanish, with the officer manager present, he admitted that he had called Mr. Fallahiye a terrorist.[47] From her inquiry she concluded that he had done so repeatedly and that he would have to be terminated, since he could not get along with the other workers.[48]

Ms. Givens further explained that many of the witnesses who were willing to speak to her declined to reduce their comments to writing.[49] She gave the names of two employees in this category: Juan Harvacio and Jose Reyes.[50]

She said that, other than the June 1st final-warning, Claimant's personnel file did not contain reports of other incidents of teasing or insulting

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46 Referee Hearing Transcript, at 69.

47 Referee Hearing Transcript, at 68-69. The officer manager was Ms. Amelia Andrade. Id.

48 Referee Hearing Transcript, at 70-71.

49 See Referee Hearing Transcript, at 74.

50 See Referee Hearing Transcript, at 74-75.

other employees.[51] And there were no other reports of Claimant harassing employees of Middle Eastern origins.[52] She said she was not surprised at the allegations because Alex liked "goofing around;" but, she did not think his comments were made in a "joking, playful" manner.[53]

Ms. Givens confirmed that Mr. Baru heard Mr. Fallahiye ask Mr. Diaz to desist from his taunting.[54] Finally, she felt they had to act because their new employee felt "harassed and intimidated."[55]

Mr. Diaz also testified, denying that he used the word terrorist or referenced bombs.[56] And he denied that he had any conversations with Mohammed Fallahiye after his first day (i.e., Monday).[57] Mr. Diaz said he was never told by his shift supervisor to stop taunting him.[58] He also said Mr. Baru

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51 See Referee Hearing Transcript, at 77.

52 See Referee Hearing Transcript, at 77-78.

53 See Referee Hearing Transcript, at 78-79.

54 See Referee Hearing Transcript, at 80.

55 See Referee Hearing Transcript, at 82.

56 See Referee Hearing Transcript, at 92.

57 See Referee Hearing Transcript, at 93.

58 See Referee Hearing Transcript, at 94-95.

does not work in his area.[59] He contradicted Ms. Givens' testimony that he admitted he called Mr. Fallahiye a terrorist.[60] He said he only asked him about being a terrorist.[61]

2

The Proceedings Before the Board of Review

As the hearing before the Board of Review was beginning, the Board announced that it would not be holding a full hearing de novo, but instead would allow the parties to supplement the substantial record that had been created before the Referee.[62]

The employer called Mr. Fiaru Beru, its six-year employee, as its first supplemental witness.[63] Mr. Beru testified that when Mr. Fallahiye came to work at Falvey Linen, he heard Alex Diaz, in English, call him a terrorist three times.[64] Not only did Mohammed Fallhiye ask him to stop saying it, Mr. Beru

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59 See Referee Hearing Transcript, at 95-96.

60 See Referee Hearing Transcript, at 97.

61 See Referee Hearing Transcript, at 97-98.

62 See Board of Review Hearing Transcript, at 5-6.

63 See Board of Review Hearing Transcript, at 7 et seq.

64 See Board of Review Hearing Transcript, at 7-9.

did as well, on more than one occasion.[65] Interestingly, Mr. Beru commented that, although Alex was a friendly fellow, he had previous problems with what he called "new recruits."[66]

Falvey Linen's second witness before the Board of Review was Mohammed Fallhiye, the alleged injured party, who had testified at the Referee hearing.[67] He explained that he waited to go to human resources on Friday because the supervisor was on vacation.[68]

Finally, the Claimant testified again.[69] He said that a supervisor named Wilson Zapata was at work during the week in question and "always walking around."[70] He also said that Mr. Beru works a distance from him — "[a]bout forty meters away.[71] Finally, he reiterated his prior testimony denying he ever

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[65] See Board of Review Hearing Transcript, at 8-9. Mr. Beru conceded that he had not mentioned he asked Alex to stop in his written statement. Board of Review Hearing Transcript, at 14.

[66] See Board of Review Hearing Transcript, at 11.

[67] See Board of Review Hearing Transcript, at 22 et seq.

[68] See Board of Review Hearing Transcript, at 23.

[69] See Board of Review Hearing Transcript, at 25 et seq.

[70] See Board of Review Hearing Transcript, at 26.

[71] See Board of Review Hearing Transcript, at 27.

used the term "terrorist" and the one comment he made was never repeated; and, he said, if he had known Mr. Fallahiye was offended, he would have apologized.[72]

B

Resolution of the Misconduct Issue

1

Overview and Summary

Appellant Diaz urges that the Board of Review erred when it reversed the decision of the Referee finding him ineligible to receive unemployment benefits because misconduct — as defined in section 28-44-18 — was not proven. We shall consider this question under the Turner standard and under the broader work-rule test.[73] For the reasons I shall now state, I believe the Board's decision denying further benefits to Mr. Diaz must be affirmed.

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[72] See Board of Review Hearing Transcript, at 28.

[73] See Employer's Exhibit No. 5, ¶ 7.2, listing "Harassment of another employee" as a "Serious Offense" justifying dismissal and Referee Hearing Transcript, at 20-22.

2

Rationale

(a)

The Turner Standard

Earlier in this opinion, I summarized the one-hundred-plus pages of testimony presented in this case.[74] But this Court's function is not to evaluate the employer's allegations de novo; instead, we are directed only to determine whether the Board of Review's factual findings are supported by reliable, probative and substantial evidence of record.[75] Clearly, they are.

The Board of Review could well rely on the testimony of Mr. Fallahiye who directly accused Mr. Diaz of harassing him by referencing terrorists and bombs repeatedly, despite being asked to stop. They could further rely on the testimony of Mr. Beru, who corroborated these allegations — and who also asked him to desist. Finally, they could rely on the testimony of Ms. Givens, who testified that Mr. Diaz admitted making these comments, saying that he did not mean them seriously. Accordingly, I cannot say that the Board acted in

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[74] See Part V-A of this opinion, supra at 10-20.

[75] See Part III of this opinion, supra at 7-9.

the absence of reliable, probative, and substantial evidence when it found Mr. Diaz had harassed Mr. Fallahiye and his denials not credible.

These findings having been made, we need only make one additional inquiry — whether the Board of Review's decision that these acts constituted proved misconduct under § 18. Appellant, in his Memorandum of Law, urges that this ruling was clearly erroneous because Mr. Diaz, by taunting a co-worker, was merely joking and did not intend to be taken seriously — and therefore did not commit misconduct.[76] His argument was stated as follows:

> … The Board concluded, as a matter of law, that Claimant was only joking, but yet, went on to find "intentional" misconduct. If claimant was only joking around, as everybody agrees, then it stands to follow that Claimant lacked the requisite intent to meet the Turner "misconduct" standard. Claimant should not be denied benefits because Mohammed is super-sensitive and did not go to a Supervisor even though he had previously worked at East Side Market. If Mohammed asked Claimant to stop, as he alleges, the language and cultural barriers could have easily lead to a misunderstanding. Indeed, Claimant apologized after he met with Human Resources and learned how upset Mohammed allegedly was.
>
> The employer made a mountain out of molehill here. The employer could have simply counseled Claimant to stop his behavior and issue him a written warning. Instead, the employer overreacted and discharged a 9 year employee who never had any issues with any other employees in a workplace that encompassed twenty-six (26) different nationalities.
>
> The employer clearly did not meet its burden to prove willful, intentional misconduct. At most, this was an isolated instance of

[76] See Appellant's Memorandum of Law, at 14.

> poor judgment that does not rise to the level of misconduct required by Turner. …

Appellant Memorandum of Law, at 14. But in my view this argument, although well and concisely stated, is built upon a false premises.

Claimant assumes that because he was "joking" with Mr. Fallahiye, it was necessarily harmless. I do not agree. The word "joking" is used here in a narrow sense — that he did not really believe that Mr. Fallahiye was a terrorist and that he was just using this term as one uses any stimulant, to get a response. The argument further assumes (implicitly) that the workforce at Falvey Linen is employed, at least in part, for the amusement of Mr. Diaz, as grist for his mill, not only to perform their assigned tasks. To the contrary, I believe Falvey Linen has a strong interest in maintaining a workplace that is free of ethnic friction. And Claimant describes Mr. Fallahiye as "super-sensitive," a characterization I utterly reject; in my estimation, his statements violated objective standards of conduct.[77] And finally, he urges that a claimant cannot be denied benefits unless he has committed an act of misconduct after being counseled to stop. I know of no such limitation on section 18 disqualifications.

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[77] I assume that in the days after September 11, 2001 this point is self-evident and needs no further discussion or buttressing from me.

Accordingly, I do not believe the Board of Review's finding of misconduct is clearly erroneous. Mr. Diaz made his comments intentionally and repeatedly, although perhaps not with the specific intent to give offense to his co-worker or to achieve the motive of disrupting the efficiency of Falvey Linen's operation. But, as the Board held, he acted in total disregard of the feelings of his co-worker and with complete indifference to the effect that his stimulation would have on the work environment at Falvey Linen.[78] This indifference, in my view, is sufficient to satisfy the element of "willful disregard" enunciated in § 18 and Turner.[79] And so, I believe the Board of Review acted within its authority when it concluded that Mr. Diaz's actions violated the employer's policy on employee conduct.

(b)

The Violation of the Falvey Linen Anti-Harassment Work Rule: Paragraph 7.2 of the Employer's Manual

As explained above, misconduct may now be proven in two ways — (1) traditional misconduct, as defined in Turner, and (2) violation of a work rule.

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[78] The employer was also concerned about potential liability for its failure to provide a safe and harassment-free work environment. Referee Hearing Transcript, at 18, 70-71.

[79] See § 28-44-18 and Turner, quoted supra in Part II of this opinion, at 6-8.

Although a Falvey Linen anti-harassment work rule was entered into evidence, the Board did not discuss this issue. This is curious, since the allegation that was leveled against Mr. Diaz — that he made comment after comment, day after day, after being asked to desist — patently falls within the ambit of the Employer's harassment policy. And the Board found the allegations to have been proven. Therefore, the Board committed error, as its decisions must address all issues properly raised.

But even though the record is replete with evidence that Claimant violated the employer's anti-harassment work rule,[80] we need not remand this case back to the Board for a finding on the work-rule issue. If my recommendation of affirmance on the traditional Turner misconduct disqualification is adopted, this issue shall be moot.

D

Summary

Pursuant to § 42-35-15(g), the decision of the Board of Review must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the

[80] And on this question, Mr. Diaz's protestations that his actions were not made in reckless disregard of the employer's interests — as required in a traditional section 18 analysis — is immaterial. It is only important that he intentionally violated the work rule.

substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of which witnesses to believe.[81] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[82] Accordingly, I must conclude that the Board of Review's finding — that the Claimant was terminated for proved misconduct (i.e., violating Falvey-Linen's prohibition on harassment by taunting Mr. Fallahiye) — is not clearly erroneous in light of the reliable, probative, and substantial evidence of record. As a result, I must recommend that the decision of the Board be affirmed.

VI

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, the instant decision was not

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[81] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[82] Cahoone, supra n. 81, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 9 and Guarino, supra at 9, n. 13.

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

December 16, 2013