STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Record Retrievers, Inc.	:	
	:	
v.	:	**A.A. No. 13 - 036**
	:	
Department of Labor and Training,	:	
Board of Review	:	
(Crystal Tremblay)	:	

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 & 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 the Appellant, Record Retrievers, Inc., urges that the Department of Labor and Training Board of Review erred in finding its former employee, Ms. Crystal Tremblay, eligible to receive unemployment benefits notwithstanding the employer's assertion that she 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

[1] See Gen. Laws 1956 § 28-44-18.

Security Act[2] and the procedure that we follow in hearing such cases is that 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 granting benefits to Ms. Tremblay 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

Ms. Crystal Tremblay's twenty-six month employment by Record Retrievers, Inc. ended on October 18, 2012, when she was discharged. On November 16, 2012, a designee of the Director of the Department of Labor and Training found her eligible to receive benefits,[5] a decision from which the

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[2] See Gen. Laws 1956 § 28-44-52.

[3] See Gen. Laws 1956 § 42-35-15(g).

[4] See Gen. Laws 1956 § 8-8-8.1.

[5] See Claimant Decision, November 16, 2012 — Exhibit D2A.

employer appealed. As a result, a hearing was scheduled before a referee employed by the Board of Review on December 11, 2012. Claimant appeared with counsel; Record Retrievers was represented by its Human Resources Manager — Ms. Kimberly Dube. In his decision issued on December 12, 2012, Referee Gunter A. Vukic, made the following Findings of Fact regarding claimant's separation:

> **2. FINDINGS OF FACT:**
>
> I find by preponderance of credible testimony and evidence the following findings of fact:
>
> Approximately two weeks after returning from vacation the claimant was discharged by the manager due to staffing changes. Claimant filed for Employment Security benefits the following day.

Referee's Decision, December 12, 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 formed the following conclusions on the issues of Ms. Tremblay's conduct and her eligibility for benefits:

> **3. CONCLUSION:**
>
> * * *
>
> In cases of termination, the employer bears the burden to prove by preponderance of credible testimony or evidence that the claimant committed an act or acts of misconduct as defined by the law in

> connection with her work. It must be found and determined that the employer has failed to meet their burden.
>
> The claimant's first hand testimony is weighed against the human resources official appearing at the hearing who testifies that the termination by the manager was actually due to a violation of the teamwork pledge allegedly occurring one month earlier. The claimant was unaware of the employer allegation until she was adjudicated November 9, 2012. The record is void of any credible disciplinary action taken against the claimant during her time of employment.

Referee's Decision, December 12, 2012, at 2. Thus, Referee Vukic found Claimant Tremblay not to be disqualified from receiving benefits because of proved misconduct.

The employer filed an appeal and the matter was reviewed on its merits by the Board of Review. On January 28, 2013, the members of the Board of Review unanimously held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision of the Referee was affirmed. Finally, on February 27, 2013, the employer — Record Retrievers, Inc. — filed a complaint for judicial review in the Sixth Division District Court.

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

III

Standard of Review

The standard of review is provided by R.I. Gen. Laws § 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.' "[6] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[7] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[8]

The Supreme Court of Rhode Island directed 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 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

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6 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).

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

8 Cahoone v. Board of Review of the Department of Employment Security, 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).

> 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. More precisely, was Claimant Tremblay properly deemed eligible to receive unemployment benefits because she was discharged from her position in the absence of proved misconduct pursuant to § 28-44-18?

V

Analysis

As stated above, the Board of Review — by adopting the decision of the Referee as its own — found that Claimant Tremblay was not discharged for proved misconduct. But Appellant, in its Memorandum of Law, urges that this ruling was clearly erroneous because Ms. Tremblay, by using vulgar language in the workplace, committed misconduct. See Appellant's Memorandum of Law, passim. In order to evaluate the propriety of the Board's finding of eligibility, we shall begin by summarizing the testimony elicited at the hearing before the Referee.

A

Misconduct — The Factual Record.

The first witness to testify at the hearing conducted by Referee Vukic was Kimberly Dube, Appellant's Human Resources Manager, who endeavored to prove that Ms. Tremblay had committed misconduct while in the employ of Record Retrievers — specifically, that she had violated the company's "no gossiping" policy on several occasions. Referee Hearing Transcript, at 5-8.[9]

[9] See the policy, contained in the record as Exhibit D1F.

According to Ms. Dube, the incident that precipitated Ms. Tremblay's termination occurred on September 17, 2012 and consisted of the Claimant saying to another employee that it was "bullshit" for management to move the schedule around to accommodate the owner's niece, a lady named "Michelle." Referee Hearing Transcript, at 10. Unfortunately for Claimant, Michelle heard the comment and reported it to a manager. Referee Hearing Transcript, at 11-13. Later that same day, Ms. Tremblay was called in by management and given a warning. Referee Hearing Transcript, at 18.

But, according to Ms. Dube, the warning Claimant was given was a sham, for management had already decided to do two things — (1) to discharge Claimant and (2) to repost her position. Referee Hearing Transcript, at 9. But, Claimant was allowed to continue working — oblivious to the reality that her job was about to end — for a month — during which time she did not violate the no-gossip rule. Referee Hearing Transcript, at 9.

Ms. Tremblay also testified, and offered a slightly, but significantly, different story. She admitted that, when she found out about the schedule change she muttered under her breath "That's bullshit." Referee Hearing Transcript, at 21. She was alone in her cubicle. Id. She did not say it to her co-worker, Hannah, who was on the phone. Id. But Michelle heard it. Id. As a

result, she was brought upstairs twenty minutes later and given a warning. Id. When she was fired, she was told it was due to "staffing changes." Referee Hearing Transcript, at 23. The September 17th incident was not raised as an issue. Id.

B

Misconduct — Sufficiency of the Allegation.

1

Generally

The foregoing is a fair synopsis of the testimony taken at the hearing conducted by Referee Vukic. But before we examine it to see if the Board of Review's decision was supported by the record, I believe we need to clarify the nature of the misconduct alleged.

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 that would also be criminal, such as theft and assaults, and behavior not rising to that standard, such as the use of offensive language.

However, more recently, the legislature broadened the definition of misconduct to include the violation of a uniformly enforced work rule. Now, misconduct may be alternatively defined as "… a knowing violation of a reasonable and uniformly enforced rule or policy of the employer." Id.[10] Since Record Retrievers discharged Ms. Tremblay for gossiping in violation its work rule, not conduct that would be deemed disqualifying per se it is under the broader definition of misconduct that we must evaluate the instant case.

2

The Specific Allegation

Ms. Tremblay was fired for gossiping in violation of an office policy. Ms. Dube informed Referee Vukic that the policy Claimant violated had been provided to her in written form. Referee Vukic noted that a copy, signed by the defendant, was present in the record. And this document, titled a "Teamwork Pledge," which was signed by Ms. Tremblay in October of 2011, is indeed

[10] 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 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).

contained in the administrative record certified to this Court. Its provisions may be quoted as follows:

> We pledge to work as a team and respect each other's opinions.
> We pledge to be available when we say we will to each other and our client's [sic].
> We pledge to act professional at all times.
> We pledge to discuss any complaints with management first before airing them out publicly.
> We pledge to treat other employees, clients, bosses as we would like to be treated.

See Exhibit D1F. Ms. Dube repeatedly referred to this pledge as containing a no-gossiping rule, but gossiping about fellow employees is not expressly proscribed within it.

And no comment ascribed to Ms. Tremblay in this case could fairly be described as gossip, at least according to a traditional definition:

> **Gossip 4a:** rumor, report, tattle or behind-the-scenes information esp. of an intimate or personal nature

Webster's Third New International Dictionary (1961), at 981.

C

Resolution of the Misconduct Issue

Appellant employer urges that the Board of Review erred when it affirmed the decision of the Referee finding Ms. Tremblay was not disqualified

from the receipt of benefits for proved misconduct. I believe this decision must be affirmed for several independent reasons.

First, the Board of Review (by adopting Referee Vukic's decision as its own) embraced the principle invoked by both the Referee and the Director, that Claimant cannot be found to have been discharged for her conduct on September 17, 2012 since she was not fired for approximately one month. See Decision of Referee, at 2 and Decision of Director, at 1 (Exhibit D2A). Elsewhere, this issue has been denominated one of "temporal remoteness." In Tundel v. Commonwealth, Unemployment Compensation Review Board, 44 Pa. Cmwlth. 312, 404 A.2d 434 (1979), the Court held that where Claimant was not terminated until 25 days after Claimant was alleged to have fallen asleep on duty, "… it was unlikely that an employer would consider the specific incident to be of such grave consequence as to constitute willful misconduct. An incident of willful misconduct cannot be so temporally remote from the ultimate dismissal and still be the basis for a denial of benefits." Tundel, 44 Pa. Cmwlth. at 316, 404 A.2d at 436.[11] Thus, the principle to be gleaned from this case is that the employer's delay in dismissing the claimant belies its position

[11] This principle has been followed in a number of Pennsylvania cases, including Panaro v. Commonwealth, Unemployment Compensation Review Board, 51 Pa. Cmwlth. 19, 413 A.2d 772 (1980).

that his or her behavior was so egregious as to require, not only termination, but the denial of unemployment benefits.

And this principle (though unnamed) has been recognized in at least one prior decision of this Court. In Walden v. Department of Employment and Training Board of Review, A.A. No. 91-100 (Dist.Ct. 7/19/1991), the Court considered a Board of Review decision holding that a Department of Transportation worker whose driving privileges were suspended was ineligible to receive benefits. However, Mr. Walden was not terminated immediately when he informed his superiors that his license had been suspended for three months; instead, he was reassigned to non-driving duties. Walden, supra, slip op. at 5. He had been performing these duties for about a month when he was tendered a Termination Notice stating that he was being terminated "for the good of the service."

In his opinion Chief Judge DeRobbio focused on the DOT's response to the suspension of Mr. Walden's license —

> The claimant at the time of the termination was performing non-driving duties, and there was no license requirement for this employment. If the department intended to terminate this claimant for his loss of license, this termination should have been immediate. Although he had a truck driver's classification, he was in fact discharged for the good of the service from a non-driving employment. This in this Court's opinion is a lay-off from the

> non-driving job, and not misconduct under disqualifying circumstances in connection with his employment.

Walden, supra, slip op. at 5-6 (Emphasis added). And so, the Court reversed Mr. Walden's disqualification.

I believe the similarity between the Walden case and the instant case is patent — in each case we see that a delay in responding to a worker's misconduct may undercut the employer's ability to oppose a Claimant's right to receive unemployment benefits.[12] Therefore, the Board of Review's ruling on this issue must be viewed as neither clearly erroneous nor contrary to law. And the rule is also supported by common sense and public policy — in its absence workers would find themselves in a perpetual state of limbo for any past transgressions, facing the loss of their positions (which they can in an at will employment state) without access to unemployment benefits.

Second, the Board of Review was well within its authority to find that Ms. Tremblay was not fired for the September 17, 2012 incident but was let go due to "staffing changes." Claimant testified under oath that when she was terminated this was the reason given to her.[13] And so, she applied for benefits

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[12] Though the employer's right to discharge the worker is not hampered.

[13] And, since they provided this reason to Ms. Tremblay, Record Retrievers fairly insured that she would receive benefits, at least initially, pending the

in good faith. The Referee (and the Board of Review by adoption of his decision) acted within his sound judgment by favoring the first-hand testimony of Ms. Tremblay as opposed to the second-hand testimony of Ms. Dube.

Third and finally, although it did not reach the issue, the Board of Review could well have found, as a question of law, that the terms of the "Team Pledge" did not provide a basis for disqualification — where, on its face, it does not specifically bar gossiping.[14] And so, for this reason as well the Board's decision to affirm Ms. Tremblay's eligibility for benefits cannot be deemed clearly erroneous or contrary to law.

Director's adjudication — thereby subjecting the unemployment fund to a series of payments that they the employer believed were undeserved.

[14] The Board could also find (as a mixed question of fact and law) that Claimant's offending statement, even as described by Ms. Dube, did not plausibly constitute gossiping about her co-worker [at least as that term is customarily defined] but rather grumbling about management's decision to reschedule a work session.

It was perhaps because of this fact that Appellant argued, in the alternative, that Claimant's behavior violated established section 18 precedents holding that the use of profane or vulgar language constitutes misconduct. See Appellant's Memorandum of Law, at 4-5. I believe the cases cited are inapposite, both in the nature of the language and the party to whom they were allegedly directed.

D

Summary

Pursuant to § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the 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.[15] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[16] Accordingly, I must conclude that the Board of Review's finding — that the Claimant had not been terminated for proved misconduct — 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.

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

[16] Cahoone, supra n. 15, 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 6-7 and Guarino, supra at 7, n. 6.

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 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