

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.

DISTRICT COURT
SIXTH DIVISION

Justin P. Mueller :
 :
v. : A.A. No. 2014 – 065
 :
Department of Labor and Training, :
Board of Review :

FINDINGS & RECOMMENDATIONS

Ippolito, M. Mr. Justin Mueller filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor and Training, which held that he was not entitled to receive employment security benefits because he was terminated for proved misconduct. This matter has been referred to me for the making of Findings and Recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. Employing the standard of review applicable to administrative appeals, I find that the decision of the Board of Review is supported by substantial evidence of record and was not affected by error of law; I therefore recommend that the decision of the Board of Review be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Claimant was employed for three months by Pane e Vino Inc. at its restaurant on Atwells Avenue in Providence. His last day of work was November 21, 2013. He filed a claim for unemployment benefits but on January 8, 2014, a designee of the Director of the Department of Labor and Training determined him to be ineligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-18 — based on a finding that he was discharged for proved misconduct.

Mr. Mueller filed an appeal and a hearing was held before Referee Nancy L. Howarth on February 3, 2014. On February 10, 2014, the Referee held that Mr. Mueller was disqualified from receiving benefits because Pane e Vino had proven misconduct. In her written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

The claimant had been tardy for his shift on several occasions and had received verbal warnings. On November 23, 2013 the claimant was scheduled to begin work at 3:00 p.m. He had problems with his vehicle that day. At approximately 2:30 p.m. the claimant called and requested to speak to the employer. She was not on the premises at the time. The claimant left a message with a co-worker and a voicemail message for the employer. The employer returned his call at approximately 3:05 p.m. The employer advised the claimant that he would be allowed to

work if he could report by 3:30 p.m. At approximately 3:20 p.m. the general manager called the claimant to inform him that he was being discharged.

Decision of Referee, February 10, 2014 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — the Referee pronounced the following conclusions:

* * *

The burden of proof in establishing misconduct rests solely with the employer. In the instant case the employer has sustained its burden. The evidence and testimony presented at the hearing establish that the claimant had received several warnings regarding his attendance during his three-month period of employment and that he subsequently failed to report for his shift. I find that the claimant's actions were not in the employer's best interest and, therefore, constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, February 10, 2014 at 2. The Claimant appealed and the Board of Review reviewed the matter.

On February 26, 2014, the Board of Review, through a majority of its members, affirmed the decision of the Referee and held that misconduct had been proven. The Board found the decision of the Referee to be a proper adjudication of the facts and the law applicable thereto and adopted the Referee's decision as its own. Decision of Board of Review, April 4, 2014 at 1. But, it is also worth noting that the Member Representing Labor dissented,

finding that misconduct had not been proven. Decision of Board of Review, April 4, 2014 at 2.

Mr. Mueller filed a complaint for judicial review of the Board's decision in the Sixth Division District Court on May 2, 2014. A conference with counsel for Claimant and the Board of Review was conducted by the undersigned on July 30, 2014; after that conference, a briefing schedule was established by Order. Helpful memoranda have been received from the Appellant-Claimant and the Appellee-Board of Review.

II APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically addresses misconduct as a circumstance which disqualifies a claimant from receiving benefits; Gen. Laws 1956 § 28-44-18, provides:

28-44-18. Discharge for misconduct. — An individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in

employment for one or more employers subject to chapters 42 – 44 of this title. Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, “misconduct” is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court adopted a definition of the term, “misconduct,” in which they quoted from Boynton Cab Co. v. Newbeck, 237 Wis. 249, 296 N.W. 636, 640 (1941):

‘Misconduct’ * * * is limited to conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee’s duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity,

inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed ‘misconduct’ within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant’s actions constitute misconduct as defined by law.

Traditionally, only deliberate conduct that was in willful disregard of the employer’s interest could constitute misconduct under the Employment Security Act. See Gen. Laws 1956 § 28-44-18. However, a number of years ago the legislature amended § 28-44-18 to permit, in the alternative, a finding of misconduct to be based on the violation of a rule promulgated by the employer —

... “misconduct” is defined as ... 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. ...

Gen. Laws 1956 § 28-44-18 as amended by P.L. 1998, ch. 401, § 3. Note the elements of the new standard: (1) the rule must be violated knowingly, (2) the rule must be reasonable, (3) the rule must be shown to be uniformly enforced, and (4) the employee must not have violated the rule through incompetence.

The particular ground of misconduct alleged in the instant matter, a pattern of lateness, has been the subject of many prior District Court

decisions. This Court has long held that tardiness may constitute misconduct within the meaning of section 18. This is consistent with the national rule. ANNOT., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674.

III STANDARD OF REVIEW

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

42-35-15. Judicial review of contested cases —.

* * *

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court “* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency

unless its findings are ‘clearly erroneous.’”¹ The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.² Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.³

The Supreme Court of Rhode Island recognized in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d 595, 597 (1964) that a liberal interpretation shall be utilized in construing the Employment Security Act:

* * * eligibility for benefits is to be determined in the light of the expressed legislative policy that “Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family.” G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the

¹ 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).

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

³ Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213, 215 (1968). Also D’Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

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

ANALYSIS

A

Factual Review

The hearing conducted by Referee Howarth began with the usual housekeeping matters, including — the administration of the oath to the witnesses (Referee Hearing Transcript, at 3), the enumeration of exhibits that had been transmitted from the Department as part of the record (Referee Hearing Transcript I, at 4-5), and a discussion of the order of proof. (Referee Hearing Transcript I, at 5-6). These preliminaries done, the testimony began.

At the hearing before the Referee on February 3, 2014, the employer presented two witnesses — Ms. Esther Gonzalez, General Manager and Ms. Amanda Carnevale, a server. Referee Hearing Transcript, at 2-3.

Testimony of Ms. Gonzalez

Ms. Gonzalez testified as to the incident that occurred on Saturday, November 23, 2014. She began by stating that Mr. Mueller was scheduled to work beginning at 3:00 p.m. Referee Hearing Transcript, at 7. Although she was not scheduled to work that day, after 3:00 p.m. she received a call from a staff member indicating that Justin had just called-in, saying he could not report for work due to car problems and that they should replace him. Referee Hearing Transcript, at 9, 15-16. Apparently, he also told the employee with whom he spoke that he did not have cab fare. Id.

And so, Ms. Gonzalez called Mr. Mueller (or he called her, she was not sure) and they spoke. Referee Hearing Transcript, at 9. During this conversation, Ms. Gonzalez offered to get Claimant a ride, but he declined the offer, saying he was trying to get his car fixed. Referee Hearing Transcript, at 10. In any event, she told him that she needed employees who come to work on time. Referee Hearing Transcript, at 17. So, she told him that if he could get to work within 30 minutes, she would be “fine.” Referee Hearing Transcript, at 17, 20. But, as the 30-minute deadline approached, she decided she needed to replace Mr. Mueller, so she contacted the on-call server.

Referee Hearing Transcript, at 18. Ms. Gonzalez could not be precise as the length of time that had expired when she did this — 25, 35, 40 minutes. Referee Hearing Transcript, at 19.

Ms. Gonzalez further related that Mr. Mueller had been warned previously about lateness, including three days earlier, on November 20, 2013. Referee Hearing Transcript, at 10-11, 32-33. However, these warnings were not in writing. Referee Hearing Transcript, at 13-14.

2

Testimony of Ms. Carnevale

Next, Ms. Carnevale testified. Referee Hearing Transcript, at 21 *et seq.* She said that, although she did not speak to Mr. Mueller directly, she was aware of the controversy on November 23rd. Referee Hearing Transcript, at 21. She learned Mr. Mueller was not coming-in (due to car trouble) from the person who spoke to him. Referee Hearing Transcript, at 22-23. She was also made aware that — although he was given options — Claimant would not accept a ride or a cab ride. Referee Hearing Transcript, at 24-25, 35. Ms. Carnevale testified that Mr. Mueller had been late before, several times before, and had been counseled. Referee Hearing Transcript, at 30-31.

Ms. Carnevale testified that it was known among the servers that missing one's shift would cause the server to be dismissed. Referee Hearing Transcript, at 26, 28. Perhaps because of this policy, it is not typical for servers to be late. Referee Hearing Transcript, at 31.

3

Testimony of the Claimant, Justin Mueller

Mr. Mueller began his testimony by indicating that he began to work for Pane e Vino as a server on August 17, 2013. Referee Hearing Transcript, at 35. He then focused on the events of November 23, 2013.

Claimant testified that he went out to his car at 2:30 p.m. but it would not turn over. Referee Hearing Transcript, at 36. Believing the battery to be dead, he knocked on a few of his neighbors' doors, trying to get a jump start, but no one responded. Referee Hearing Transcript, at 36-37. At 2:45 p.m., Mr. Mueller went inside to call the restaurant, and got through to the "bar-back;" he explained that he was having car troubles; in response, he was given Esther's cell phone number, which he called and left a voicemail message. Referee Hearing Transcript, at 37. While he was waiting for a return call, he got in touch with his mother, who agreed to give him a ride. Id.

At 3:05, Ms. Gonzalez returned his call. Referee Hearing Transcript, at 38. It was a short conversation, she telling Claimant that he had thirty minutes to get to work. Id. Then, at 3:10 his mother picked him up and they headed to work. Referee Hearing Transcript, at 39. While on the way to work, he received a phone call from Richard, a server at the restaurant, who told Claimant he was terminated. Referee Hearing Transcript, at 40. That call came in at about 3:20 p.m. Referee Hearing Transcript, at 41.

Mr. Mueller described the warnings he had received for tardiness as being “verbal.” Referee Hearing Transcript, at 41. He declared he had never received a “final warning.” Referee Hearing Transcript, at 41.

On cross-examination Mr. Mueller conceded he never told Ms. Gonzalez that his mother was going to give him a ride. Referee Hearing Transcript, at 42-44. He further denied that he had been late three days earlier, but admitted he was not on the floor. Referee Hearing Transcript, at 44-45.⁴ He also conceded that while he was never given a “final” warning, on

⁴ On redirect he attributed the fact that he was not on the floor at the beginning of his shift on the prior Wednesday to the fact that his girlfriend had “dumped” him while he was on the way into work, which exacerbated his diverticulitis. Referee Hearing Transcript, at 49-50.

that last occasion he had been given a “very strong” warning. Referee Hearing Transcript, at 45. Claimant also conceded he had been given more than two warnings. Referee Hearing Transcript, at 46-47. He also admitted the rules about tardiness and absence were uniformly enforced. Referee Hearing Transcript, at 48.

B

Rationale

The issue before the Court is straightforward — Was Claimant properly disqualified from receiving unemployment benefits because of instances of tardiness. Based on the facts outlined above, I believe the answer to this question must be yes.

In finding that Claimant violated the standards of promptness expected of the servers at Pane e Vino, the Board could rely on the testimony of Ms. Gonzalez and Ms. Carnevale, which provided competent evidence of (1) the employer’s expectations regarding adherence to promptness and avoiding tardiness, (2) that these expectations were clearly communicated to Claimant,

(3) that Mr. Mueller failed to meet those standards, and (4) that this policy was uniformly enforced.⁵

Appellant, in his Memorandum of Law, argues that the employer gave Mr. Mueller thirty minutes to get to the restaurant and, before that time had expired, she rescinded the offer and fired him; he implies he could have met the deadline.⁶ He ascribes this action by Ms. Gonzalez to his belief that she neither liked him nor respected his work.⁷

The employer alleged that Claimant was fired specifically because of attendance issues, nothing more. And the testimony of the Employer's witnesses supported this assertion. If believed, as it was, it was sufficient to support the Board's conclusion.

Pursuant to the applicable standard of review described supra at 7-9, the decision of the Board of Review must be upheld unless it was, *inter alia*,

⁵ See Appellee's Memorandum of Law, at 2-3.

⁶ See Appellant's Memorandum of Law, at 2, 4. I believe — even if true — this issue is a red herring. If Mr. Mueller was subject to a disqualification for misconduct at 3:00 p.m., was he not still subject to the same finding at 3:20 p.m. or 3:25 p.m.? Certainly, nothing had happened to cure his lateness by the time Ms. Gonzalez acted. The offer she extended was hers to make and hers to withdraw. He was either guilty of misconduct or not.

⁷ See Appellant's Memorandum of Law, at 2, 4-5.

contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. This Court is not permitted to substitute its judgment for that of the Board as to the weight of the evidence; accordingly, the findings of the agency must be upheld even though a reasonable fact-finder might have reached a contrary result. Applying this standard of review and the definition of misconduct enumerated in § 28-44-18, I must conclude that the Board's adopted finding that Claimant was discharged for proved misconduct in connection with his work — i.e., his repeated instances of tardiness — is not clearly erroneous in light of the reliable, probative and substantial evidence of record.

V
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Furthermore, it is not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(5). Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

_____/s/_____
Joseph P. Ippolito
Magistrate
May 12, 2015

