STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Morgan French	:	
	:	
v.	:	**A.A. No. 14 - 087**
	:	
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 and the memoranda of counsel, 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 Court at Providence on this 28th day of April, 2015.

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. Ms. Morgan French 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 she was not entitled to receive employment security benefits because she 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 one year and seven months by Whole Foods Inc. at its Providence stores. Her last day of work was January 16, 2014. She filed a claim for unemployment benefits but on February 26, 2014, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits pursuant to Gen. Laws 1956 § 28-44-17 — based on a finding that by failing to report to work she quit her job.

Ms. French filed an appeal and a hearing was held before Referee Nancy L. Howarth on April 1, 2014. On April 11, 2014, the Referee held that Ms. French was disqualified from receiving benefits because Whole Foods had proven misconduct. In her written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> The claimant was employed as an associate team leader by the employer. The claimant's supervisor had given her several verbal warnings regarding her attendance. The claimant received a written attendance warning on November 11, 2013, since she had left work prior to the end of her shift on October 15, 2013 and November 5, 2013. The claimant

> received a final written warning due to attendance issues on December 9, 2013 for leaving work prior to the end of her shift on November 19 and November 21, 2013, and for her absences on November 20, 2013 and December 8, 2013. Both warnings indicated that violation of the attendance policy could result in further disciplinary action, up to and including termination. However, the claimant provided a doctor's note for November 19, 2013 and November 20, 2013. The claimant left prior to the end of her shift on. She was absent on January 15, 2014 and failed to follow the proper call out procedure. The claimant was discharged on January 16, 2014 due to excessive attendance issues.

Decision of Referee, April 11, 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 left work prior to the end of her shift or was absent without medical documentation an excessive number of times, despite prior warnings. 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, April 11, 2014 at 2. The Claimant appealed and the Board of Review considered the matter.

On May 29, 2014, the members of the Board of Review unanimously 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, May 29, 2014 at 1.

Ms. French filed a complaint for judicial review of the Board's decision in the Sixth Division District Court on June 12, 2014. A conference with counsel for Claimant and the Board of Review was conducted by the undersigned on September 17, 2014; after that conference, a briefing schedule was established by Order. Counsel for both the Claimant and the employer have filed thorough and articulate memoranda that have been of great assistance as I have considered this case.

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 alterative, 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 — excessive absenteeism (or lateness) — has been held to constitute misconduct justifying disqualification from the receipt of benefits in District Court cases too numerous to cite. This has also been the view expressed nationally. See 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

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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).

> 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

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 (Id., at 4-5), and a discussion of the order of proof. (Id., at 6). These preliminaries done, the testimony began.

1

Testimony of Ms. French

Ms. French began her testimony by indicating she was terminated for two call-outs — on January 11, 2014 and January 15, 2014. Referee Hearing Transcript, at 7.[4] She then explained that Whole Foods has a "point system" for attendance issues. Id., at 8. For instance, you receive two points for an absence; it is expected that an employee will notify his direct supervisor two hours before the start of his or her shift. Id., at 8. Tardiness is reporting less than a half-hour late, which results in one point being assessed; beyond a half-hour late, without tendering notice, is considered a "no-call, no show." Id. And, at four points you receive a verbal warning; an additional four

[4] In the first sentence of this opinion I indicated that the Board of Review denied benefits to Ms. French based on a finding that she was terminated for proved misconduct (i.e., absenteeism) will wonder why Ms. French testified first, since the employer bears the burden of proving misconduct. The answer to this question is simple: as we also mentioned above, the Director's decision disqualified Ms. French on the theory that by failing to appear for work on a particular day, she quit. The Director therefore disqualified her pursuant to Gen. Laws 1956 § 28-44-17 (Leaving Without Good Cause). And in § 17 cases, the claimant bears the burden of proof.

It is probably worth noting at this juncture that I believe Referee Howarth was quite right to analyze Ms. French's claim under section 18. In my view the theory of de facto quit or constructive quit has been utilized outside of its proper parameters. Quite simply, a run-of-the-mill instance of "no call, no show" is more properly evaluated under a misconduct analysis.

points within 90 days results in a written warning; then four more points means a final warning; and, four more points leads to termination. Id., at 8-9.

Ms. French alleged that Whole Foods did not correctly follow its point system in her case. Referee Hearing Transcript, at 9. For example, she stated that she had been given two points for leaving early on more than one occasion, an infraction that should have earned her one point for each instance. Id. Inspecting a warning slip dated November 8, 2013, she said she should have received two points for leaving early on October 15th and calling out on October 16th, not three. Id., at 10 and Employer's Exhibit No. 1. And according to Ms. French, if these errors had been corrected, her written warning would have been a verbal. Id., at 11. Similarly, she stated that if other computational errors had been fixed, her final written warning would have been a mere written warning. Id. And, her discharge would have been a final written warning. Id.

She spoke about one date in particular — January 11, 2014. Referee Hearing Transcript, at 11-12. On that day — a Saturday — she missed a meeting at the store. Id. She did not attend because she was excused from working from Friday evening through Saturday evening due to a religious

accommodation. Id., at 12.[5] She testified she reminded her supervisor, Mr. Sneep, of her accommodation the day before the meeting. Id., at 12, 19. As a result, she believed she was excused from the meeting. Id., at 12. On the next day, January 12, 2014, she went into work but left early, because she was sick. Referee Hearing Transcript, at 13.

Then, on July 15, 2014, she was scheduled to work the first shift, she called out sick. Referee Hearing Transcript, at 13.[6] Due in at 7:30 a.m., she texted Mr. Sneep at about 6:50 and called the store at 7:25, but could not get a shift leader on the phone. Id. But at 7:30, she spoke to Ms. Wendy Da Costa, the payroll specialist, and advised her that, due to illness, she would not be coming in. Id., at 14. She said that the two-hour rule was not routinely enforced for the opening shift. Id. Finally, on the 16th, she went to work, but after about 40 minutes she was called into her termination meeting. Id., at 14-15. She was told she had not followed proper procedure. Id., at 20.

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[5] Ms. French was granted her religious accommodation for the Jewish Sabbath in October of 2012 while working at Whole Foods' Waterman Street location. Referee Hearing Transcript, at 17, 19. But, it was not in writing. Id. It continued to be honored when she returned to the University Heights store in June of 2013. Id., at 18.

[6] Later in her testimony, Ms. French described the symptoms of her illness. Referee Hearing Transcript, at 20. She also conceded she did not consult a physician. Id., at 20-21.

On cross-examination by the employer's agent, Ms. French admitted that — before her termination — she had never questioned the point system as it was applied to her. Referee Hearing Transcript, at 15. In fact, she raised no such objections at her termination meeting. Id., at 20.

2

Testimony of Mr. William Sneep

At the outset of his testimony Mr. William Sneep acknowledged that Ms. French had been granted a religious accommodation. Referee Hearing Transcript, at 21. It was therefore taken into account when he (or Claimant) did the scheduling. Id. However, subsequently, Ms. French expanded her requests and developed attendance issues. Id., at 21-22. At this juncture, he realized there was no documentation as to her religious requests. Id., at 22. And so, on the 16th of December (2013), he asked her to fill-out the form for a religious accommodation, which she returned to him on December 30th. Id., at 22-23.

At this point, Mr. Sneep explained why Ms. French was terminated —

> So what had happened was the schedule had been posted, for almost a week, for over a week. Morgan came up to me on Friday, actually I had come to her, I was asking her questions about if she had anything she wanted for the agenda for the team meeting, that is when she very (Inaudible) told me that she wasn't going to make it, I said, I am not sure what that means,

> you know, that you would need to talk to Alicia, store leadership about it. After that she failed to show up for the meeting on Saturday. She showed up for her shift Sunday. I was not working. She left early. Um, then she called out for her next, what was it two shifts after that, and then she showed up for her shift on Thursday.

Referee Hearing Transcript, at 24. In sum, Mr. Sneep stated that Claimant was terminated because, while on a final warning, she failed to follow proper call-out procedures — which is part of the attendance policy. Id., at 25. Specifically, on the 15th, she called in at 6:53 a.m., a mere 40 minutes before her scheduled shift. Id., at 26. Mr. Sneep indicated that there is someone at the store by 5:00 a.m. Id., at 27.

When asked by Claimant's counsel what prompted him to question her religious accommodation, Mr. Sneep responded that it was the number of requests she submitted on top of her religious accommodation, together with the fact that she began to have attendance issues. Referee Hearing Transcript, at 24-25. Then, they realized that there was never any written documentation for her religious accommodation. Id., at 25.

3

Testimony of Ms. Alicia Cataldo

Next, Ms. Alicia Cataldo — Whole Foods' University Heights store manager — testified, addressing first the status of Ms. French's religious

accommodation. Referee Hearing Transcript, at 28 et seq. She said that she was not aware of any religious accommodation until December 9, 2013, at which time she learned that the Waterman Street store had not documented it either. Id., at 28. She thereupon, on December 16th, ordered Mr. Sneep to have Ms. French document her request; but, when management had not received it by the 27th, they sat with Claimant, explaining that they were not going to honor her request until they received it — and reviewed it. Id., at 29. As a result, she received Ms. French's written request on December 31, 2013. Id. But no decision had been made. Id.

Next, Ms. Cataldo made the point that, factoring in all of Claimant's absences, approved or not, it became a "hardship" for Mr. Sneep to make up his schedule. Referee Hearing Transcript, at 29-30.

And then, the manager spoke about Ms. French's discharge, the cause of which was her failure to follow proper call-in procedures. Referee Hearing Transcript, at 30.

Regarding the administration of the point system in Ms. French's case, Ms. Cataldo added that her most recent absences (because she did not have a doctor's note) would have added six more points anyway. Referee Hearing Transcript, at 30-31, 33-34. She also said Ms. French received extra points

(for her instances of lateness and leaving-early) because she missed more than half her shift. Id., at 31. In fact, missing more than half of a shift is considered an absence. Id., at 32. Ms. Cataldo also explained that Whole Foods has a hearing process to address disputes regarding points. Id. And while considering whether to do so, Claimant could have consulted with "Wendy" — the payroll benefit specialist — regarding the assessment of her points. Id., at 33. But Ms. French never did so. Id.

In answer to a question posed by Claimant's counsel, Ms. Cataldo stated that Ms. French did not have to submit a doctor's note. Referee Hearing Transcript, at 34-35.

B

Rationale

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

In cases too numerous to cite, the Board of Review and this Court have stated — when allowing benefits — that grounds for discharging an employee and grounds for disqualifying that same employee from receiving

unemployment benefits are not equivalent. After all, except where additional protections are bestowed by a collective bargaining agreement or by civil service laws, Rhode Island is an "at will" employment state. And so, when allowing benefits, this Court is loath to express any comment on the rectitude, vel non, of an employee's discharge. Consequently, claimants may properly argue that, while the employer may have been within its rights to fire him or her, the grounds for the discharge do not rise to the level of misconduct within the meaning of § 18.

But in this case, we see the Claimant taking an opposing tack, asserting her termination was improper under the employer's internal rules. But even if true, this fact does not make her eligible per se for unemployment benefits. That question must be decided by applying § 18, not Whole Foods' rules.[7] And so, the Board of Review only needed to find Claimant had generated a pattern of absences and incomplete shifts (through instances of tardiness and early departures) in order to disqualify her for

[7] We must interject at this point that Ms. French's eligibility for benefits in the instant case is being measured under one of the traditional grounds disqualification, attendance issues, and not under the newer basis, i.e., failure to adhere the a reasonable and uniformly applied work rule. See Gen. Laws 1956 § 28-44-18 as amended by P.L. 1998, ch. 401, § 3.

misconduct. And this, the Board of Review did. See excerpt from Decision of Referee (conclusions), ante at 3.

And we could stop our analysis here — but, in the interests of fairness, let us go further, and assume Whole Foods was indeed required, as Ms. French suggests, to prove Claimant had in fact transgressed their attendance point system. The Board of Review was within its discretion to reject Ms. French's testimony that she had been assessed too many points and to credit instead Ms. Cataldo's statement explaining why she had received the amount of points she had. See summary of her testimony, ante at 16 citing Referee Hearing Transcript, at 31-32.

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, 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 her work — i.e., her attendance issues — 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

April 28, 2015