

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc.**

**DISTRICT COURT
SIXTH DIVISION**

Yvette Wightman

:

v.

:

A.A. No. 2015 - 086

:

**Department of Labor and Training,
Board of Review**

:

:

:

ORDER

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 and 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 29th day of February, 2016.

By Order:

_____/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

_____/s/_____
Jeanne E. LaFazia
Chief Judge

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Department of Labor and Training, :
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FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case Ms. Yvette Wightman asks this Court to set aside 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. After comparing the decision rendered by the Board of Review with the record certified to this Court, I have concluded that the

decision disqualifying Ms. Wightman is not clearly erroneous in light of the probative, reliable, and substantial evidence of record; 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: Ms. Yvette M. Wightman worked for The Miriam Hospital for three years as a phlebotomist until May 22, 2015, when she was discharged. She filed a claim for unemployment benefits and, on June 11, 2015, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits, pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was discharged for proved misconduct — violating a “company policy regarding patient identification and verification.” Decision of Director, June 11, 2015, at 1.

Ms. Wightman filed an appeal and a hearing was conducted by Referee Nancy L. Howarth on July 14, 2015. Claimant appeared without counsel; two employer representatives also appeared, with counsel. Two days later, on July 16, 2015, the Referee issued her written Decision, in which she made Findings of Fact on the issue of misconduct, which are quoted here in their entirety —

The claimant was employed as a phlebotomist by the employer.
The claimant’s supervisor had verbally reviewed the employer’s

policy regarding patient identification and verification with the claimant, due to the claimant's errors and failure to comply with the policy. On March 4, 2015 the claimant's supervisor sent the claimant an email reviewing the policy. On May 15, 2015 the claimant failed to follow policy, which resulted in the wrong patient being registered. The claimant was subsequently questioned regarding the incident. She admitted that she did not follow the policy. The employer investigated the situation and determined that the claimant had not complied with the employer's procedures. The claimant was discharged on May 22, 2015 for violation of the employer's policy concerning patient identification and verification.

Decision of Referee, July 16, 2015 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — Referee Howarth 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 violated the employer's policy, despite prior warnings. Therefore, I find that the claimant's actions constitute misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, July 16, 2015 at 2. Thus, the Referee affirmed the Director's decision denying benefits to the Claimant. Id.

The Claimant appealed to the Board of Review. After deliberating (and without conducting a new hearing), a majority of the members of the Board of Review affirmed the decision of the Referee — finding it to be a proper

adjudication of the facts and the law applicable thereto. Consequently, the Board adopted the decision of the Referee as its own. Decision of Board of Review, September 4, 2015, at 1. The Member Representing Labor dissented, opining that Ms. Wightman was terminated for a performance issue, and should not be disqualified for misconduct. Decision of Board of Review, September 4, 2015, at 1 (Dissent). Claimant filed a complaint for judicial review in the Sixth Division District Court on September 23, 2015.

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. — ... For benefit years beginning on and after July 6, 2014, 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 earnings greater than, or equal to, eight (8) times, his or her weekly benefit rate 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. (Emphasis added)

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.” 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 other patently offensive behavior, such as insubordination.

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” previously pronounced in a decision of the Wisconsin Supreme Court — Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 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.

However, in 1998 the legislature broadened the definition of misconduct to include the violation of a uniformly enforced work rule.¹ Now, misconduct may be alternatively defined as “... a knowing violation of a reasonable and uniformly enforced rule or policy of the employer.” This alternative type of misconduct has four elements — [1] the employee must know of the rule, [2] it must be a reasonable rule, [3] it must be uniformly enforced, and [4] the violation of the rule may not have been attributable to incompetence.

Thus, proved misconduct may now consist of — (1) traditional misconduct, as defined in Turner, and (2) the intentional violation of a work rule. Proceeding under either theory, the employer bears the burden of proving by a preponderance of evidence that the claimant’s actions constitute

¹ See P.L. 1998, ch. 369, § 3 and P.L. 1998, ch. 401, § 3.

misconduct as defined by law. Foster-Glocester Regional School Committee v. Department of Labor and Training Board of Review, 854 A.2d 1008, 1018 (R.I. 2004).

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.’ ”² The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.³ Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.⁴

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 benefits of the act; but neither does it permit this court

² 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).

³ Cahoone v. Board of Review of the Dept.of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

⁴ Cahoone, ante, 104 R.I. at 506, 246 A.2d at 215. Also, D’Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV ANALYSIS

A

The Facts of Record

While the facts of this case are not truly in dispute, it is nonetheless appropriate to begin our analysis of the Board of Review's decision by recounting the evidence and testimony adduced at the hearing, so that we may determine whether the Board's conclusion is clearly erroneous in light of the reliable, probative, and substantial evidence in the record before me.

1

Testimony of Susan Manzi

The employer's first witness at the hearing conducted by Referee Howarth was Ms. Susan Manzi, manager. Referee Hearing Transcript, at 11 *et seq.* She began her testimony under questioning by the Referee. Referee Hearing Transcript, at 12. Ms. Manzi told the Referee that Ms. Wightman, a phlebotomist, was discharged for failing to follow the patient identification and verification policy on May 15, 2015. *Id.*

Ms. Manzi said that Ms. Wightman drew blood from the patient, a child — prior to registering, ordering the test, and printing the identification labels.

Referee Hearing Transcript, at 12. She said that “[t]he policy requires that you print your labels and place them on your tubes in front of the patient. Referee Hearing Transcript, at 12-13. She added that there is what she called a “downtime procedure” under which you label the tubes with the patient’s name and date of birth. Referee Hearing Transcript, at 13. But Ms. Wightman did not follow this procedure either; she drew blood from the child, and then took the patient and her mother out to the registration area, where she registered the patient, ordered the blood draws, and printed her labels. Id. But, Claimant registered the wrong patient — the mother, not the child. Id.⁵

Ms. Manzi then explained the consequences of this error: the patient’s mother objected to the child being drawn again, as the hospital’s standard protocol would have required. Referee Hearing Transcript, at 13. But when they checked the tubes, they could not find any handwritten markings. Referee Hearing Transcript, at 14. Ultimately, however, the mother convinced the staff that she could identify the tubes; as a result, no new draw was done. Id.

Ms. Manzi then stated that Ms. Wightman had been told previously about signing her tubes and the identification and verification policy. Referee Hearing Transcript, at 14. She then described a different complaint that she had received

⁵ The Referee, possessing a healthy dose of curiosity, asked whether the mother was also a patient was answered in the negative. Id., at 13.

about Ms. Wightman from another patient. Referee Hearing Transcript, at 14-15. Ms. Manzi said Claimant was terminated based on the two incidents — the misidentification with the child and the second patient’s complaint. Referee Hearing Transcript, at 16-17. She was informed of this. Referee Hearing Transcript, at 17.

At this point, under questioning from the Hospital’s attorney, Ms. Manzi stated that Ms. Wightman had been the subject of (what was termed) a “corrective action plan” on March 2, 2015. Referee Hearing Transcript, at 18. It related to a conflict that Claimant had had with two co-workers, which the Referee deemed irrelevant. Id.

Next, Ms. Manzi told Referee Howarth about a performance recognition summary that Ms. Wightman had received for the period of April 1, 2013 to April 1, 2014. Referee Hearing Transcript, at 19. On that document Objective Number One is listed as adhering to patient identification and verification policy. Referee Hearing Transcript, at 20. It indicates that Claimant had a misidentification on December 18, 2013. Referee Hearing Transcript, at 20-21. But according to Ms. Manzi, she had none since, though they track the different kinds of errors a phlebotomist can make. Referee Hearing Transcript, at 22-22.

Ms. Manzi also related an exchange of e-mails that she had with Ms. Wightman on March 4, 2015. Referee Hearing Transcript, at 23. Ms. Wightman had told her that the labels were taking a long time to print — about twenty minutes — and so they were using the “downtime” procedure. Id. Ms. Manzi responded that they should seek assistance regarding the printer problem from the “help desk.” Id. She also told Claimant to make sure she did the requisition so she could determine what needed to be drawn and to make sure that she placed two identifiers on the tubes. Id. Ms. Manzi reiterated that these procedures were grounded in the need for patient safety. Id., at 24.

2

Testimony of Ms. Wightman

In answer to a question from the Referee, Claimant confirmed that she was terminated on May 22, 2015; she said she was called to Ms. Manzi’s office to discuss complaints about her, and when she got there she was taken into an adjoining room where she met with a gentleman from Human Resources. Referee Hearing Transcript, at 26-27. According to Ms. Wightman, she was told she was being terminated due to the multiple complaints about her during the last two weeks. Referee Hearing Transcript, at 27-29. And, according to Claimant, when she asked management to verify that she (Ms. Wightman) was

the phlebotomist who drew the patient who complained, Ms. Manzi told her that the complaints were anonymous. Referee Hearing Transcript, at 29. And then she said — “We’re gonna terminate you as of today.” Id. Ms. Manzi then left the room, leaving Ms. Wightman with the human resources person. Id.

And while the human resources person did not identify the precise reason (or reasons) for her termination, he did discuss several things with Claimant. Referee Hearing Transcript, at 30. He mentioned a patient identification issue; to which she responded (to Referee Howarth) that the reason why they could use the vials are because she did mark them with the patient’s name and date of birth, which they found underneath when they pulled back the top label. Id. She attributed the mistake to the fact that there was a new computer system. Id. She also maintained that she was not the only person to make that mistake. Referee Hearing Transcript, at 31. She was also adamant that Ms. Manzi never told her this incident was the reason for which she was terminated. Id.

3

Testimony of David Goldman

At this juncture the human resources person she had mentioned in her testimony was identified as being Mr. David Goldman, who was also present at the hearing. Referee Hearing Transcript, at 1, 27, 32. He was sworn as a witness

and began to testify under questioning by counsel for the Hospital. Referee Hearing Transcript, at 33. Mr. Goldman said that Ms. Wightman was brought into the office on May 22, 2015 to discuss the “mishap” regarding the child’s blood being attributed to her mother. Referee Hearing Transcript, at 34. He indicated that the issue of her error had been brought to the highest levels of the hospital leadership — in the pathology and human resources departments. Referee Hearing Transcript, at 35, 37.

Mr. Goldman said that Ms. Wightman admitted that she had violated the identification policy. Referee Hearing Transcript, at 38. He added that — “At no time did anyone believe this was anything other than a mistake, but one that had been repeated in the past.” Id. And because Ms. Manzi felt that additional corrective action would not yield improvement on Ms. Wightman’s part, she was terminated. Referee Hearing Transcript, at 38-39.

According to Mr. Goldman, Ms. Wightman was terminated because of the patient identification issue — and that is what he told her, notwithstanding Ms. Manzi’s reference to the other patient’s complaint. Referee Hearing Transcript, at 39-40. Nevertheless, he conceded that he was merely an advisor regarding Claimant’s termination, not the decision-maker. Referee Hearing Transcript, at 40.

4

Further Testimony of Ms. Manzi

At this juncture the Referee confirmed that Ms. Manzi had referenced the issue of the second patient's complaint with Claimant. Referee Hearing Transcript, at 40. And Ms. Manzi verified that the termination was for both reasons, though the primary reason was the misidentification. Referee Hearing Transcript, at 41-42.

5

Further Testimony of Ms. Wightman

Finally, Ms. Wightman reiterated that when she got into the room Ms. Manzi said only five or six words to her before she left; the conversation about the incident of misidentification occurred between her and Mr. Goldman only. Referee Hearing Transcript, at 44.

B

Discussion and Resolution

1

The Allegation of Misconduct

The circumstances of Claimant's separation from the Hospital are clear. Ms. Wightman, who had worked at the Miriam Hospital as a phlebotomist for three years, was fired on May 22, 2015, because she had mislabeled tubes of blood drawn from a child and because of anonymous complaints from patients.

At least, this is the position of Ms. Manzi, the manager who made the decision to fire Ms. Wightman; and it conforms to the Claimant's understanding of the grounds for her termination. The human resources manager involved in the matter believed Claimant was fired solely for the mislabeling incident.

The Director disqualified Ms. Wightman for violation of the hospital's policy on identification and verification. The Referee, and the Board by adopting the Referee's decision as its own, considered only that conduct. Nothing about a patient complaint or any other matters were cited. And so, while Claimant may well have been fired for multiple reasons, she was disqualified for only one — the misidentification incident. As a result, we too shall focus on that one allegation.

2

The Type of Misconduct Charged

As was stated above, there are two kinds of disqualifying misconduct recognized under § 28-44-18 — (1) conduct which is offensive per se under the Turner-Neubeck standard and (2) violation of a work rule established by the employer. It appears that the Board treated Claimant's misidentification incident as one of the latter type of transgressions. We shall therefore evaluate her conduct on that basis.

Resolution

Mr. Goldman stated that the hospital's management never thought that Claimant's error — i.e., mislabeling the minor patient's blood vials — was anything other than accidental. But while indubitably true, this statement is immaterial. Ms. Wightman was neither fired nor disqualified from receiving benefits because she made that mistake,⁶ but because she did not follow the proper procedure — she did not identify and verify before she drew the child's blood. And this (i.e., drawing first) she did intentionally, even though she had been recently reminded of the proper procedure. Undoubtedly, the consequences of this error could have been worse. While I personally (if I were considering the matter de novo) might have viewed the incident as an isolated error, I cannot say that the Board's decision finding misconduct (applying the work-rule standard) was clearly erroneous.

My conclusion in this case is supported by prior decisions of this Court — one old, one new — which are reminiscent legally and factually.

⁶ Claimant said she entered the draw order into the computer after she drew the blood; I infer, from the explanations of the system that she and Ms. Manzi provided, that it was a data-entry error made at that time which caused the labels to print with the incorrect name.

The earlier case is Gary LeBeau v. Department of Employment and Training Board of Review, A.A. No. 92-353 (Dist.Ct. 11/2/93)(DeRobbio, C.J.). In LeBeau the Claimant, a health care worker at a rehabilitation center, was terminated for failing to record (in a medication log) the fact that he had dispensed medication to certain patients. LeBeau, slip op. at 5. The Director's disqualification of the Claimant for misconduct was upheld by the Referee and the Board of Review. LeBeau, slip op. at 2. This Court affirmed, finding that the potentially dangerous consequences of his behavior to the patients in question fully justified the Board's finding of misconduct. LeBeau, slip op. at 7.

The newer case is Joyce Guilfoyle v. Department of Labor and Training Board of Review, A.A. No. 14-147 (Dist.Ct. 06/30/15). In Guilfoyle, the Claimant was a licensed practical nurse (LPN) at a nursing home; she was discharged because she failed to properly document the administration of medications. Guilfoyle, slip op. at 3. The Board found misconduct, under the per se Turner-Neubeck standard, based on the fact that the same error was made as to a number of patients. Guilfoyle, slip op. at 20-21. The Court, based upon the recommendation of the undersigned, found that this decision was not clearly erroneous and affirmed. Guilfoyle, slip op. at 20-21.

In my view, the instant case is stronger than LeBeau and Guilfoyle, because they were decided under the “per se” standard for misconduct and Ms. Wightman’s case has been considered under the “work-rule” theory. Accordingly, I shall recommend affirmance of the Board of Review’s decision.

V
CONCLUSION

Pursuant to the applicable standard of review described ante at 8-10, 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. Applying this standard of review, and based on the record certified to this Court, I find that the decision of the Board of Review is not affected by error of law; nor is it clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Gen. Laws 1956 § 42-35-15(g)(3), (4), and (5).

Accordingly, I recommend that the decision rendered by the Board of Review in this case be AFFIRMED.

_____/s/
Joseph P. Ippolito
Magistrate
February 29, 2016

