



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

DISTRICT COURT

Leslie J. Pratt :  
 :  
v. : A.A. No. 12-066  
 :  
Department of Labor & Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this administrative appeal Ms. Leslie J. Pratt urges that the Board of Review of the Department of Labor & Training erred when it found her ineligible to receive employment security benefits pursuant to Gen. Laws 1956 § 28-44-18 of the Rhode Island Employment Security Act. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to Gen. Laws 1956 § 28-44-52. 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 finding Ms. Pratt ineligible to receive benefits to be 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.

## FACTS & TRAVEL OF THE CASE

Claimant had been employed as a licensing aide by the Department of Business Regulation for approximately nineteen years until she was discharged on October 16, 2011. She filed for unemployment benefits but on November 21, 2011 the Director of the Department of Labor and Training denied her claim, finding Ms. Pratt had been discharged for disqualifying reasons under Gen. Laws 1956 § 28-44-18. The claimant filed a timely appeal and on January 5, 2012 a hearing was held before Referee William Enos at which the claimant and four employer representatives appeared. See Referee Hearing Transcript, at 1.

In his January 6, 2012 decision, the Referee made findings of fact, which are presented here in their entirety:

### **2. FINDINGS OF FACT:**

The claimant worked as a Licensing Aide for the Rhode Island Department of Business Regulations for nineteen years last on October 6, 2011. The employer testified and produced evidence that showed that in May 2009 the claimant was warned for repeated absenteeism and tardiness and put on a mutually agreed on Last Chance Agreement. The employer testified and produced evidence that showed that the claimant had violated her Last Chance Agreement in over one hundred instances and was terminated. The claimant testified that the Last Chance Agreement was impossible to abide by, and her bosses had it out for her.

Referee's Decision, at 1. Based on these findings, and after quoting the standard of misconduct found in Section 28-44-18, the Referee made the following conclusions:

\* \* \*

I find from the credible testimony and evidence presented that the claimant was terminated under disqualifying reasons since the claimant's actions were not in the best interest of the employer. Based on this

conclusion, I find that the claimant is not entitled to Employment Security benefits under Section 28-44-18 of the above Act.

Referee's Decision, at 2. Thus, the referee determined that the claimant was discharged under non-disqualifying circumstances within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 2. Accordingly, he affirmed the decision of the Director. Referee's Decision, at 2.

The claimant filed a timely appeal on January 20, 2012 and the matter was reviewed by the Board of Review. Then, on February 17, 2012, the Board of Review unanimously affirmed the Referee's decision, finding it to be an appropriate adjudication of the facts and the law applicable thereto and adopted the Referee's decision as its own. See Decision of Board of Review, at 1. Thereafter, Ms. Pratt filed a complaint for judicial review in the Sixth Division District Court.

### **APPLICABLE LAW**

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.

### **STANDARD OF REVIEW**

Judicial review of the Board’s decision by the District Court is authorized under § 28-44-52. The standard of review is enumerated by Gen. Laws 1956 § 42-35-15(g) of the Administrative Procedures Act (“A.P.A.”), which provides:

The court shall not substitute its judgment for that of the agency as to 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 constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon lawful 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.”

The scope of judicial review by this Court is also limited by Gen. Laws 1956 § 28-44-54, which in pertinent part provides:

The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules shall be conclusive.

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. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980)(citing § 42-35-15(g)(5)). The Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). “Rather, the court must confine itself to review of the record to determine whether “legally competent evidence” exists to support the agency decision.” Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621

A.2d 200, 208 (R.I. 1993)). “Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record.” Baker, 637 A.2d at 363.

### **ANALYSIS**

The issue before the Court is whether the Board of Review’s decision that claimant was terminated for proved misconduct was clearly erroneous. In practical terms, Ms. Pratt was fired for repeated and excessive lateness.

Legally, it cannot be doubted that claimant’s failure to appear on time for a shift constitutes conduct which would be adverse to the employer’s best interests. Such scheduling problems have long been held to constitute grounds for findings of proved misconduct, in Rhode Island and across the nation. See 76 Am. Jur. 2d Unemployment Compensation § 89 (2005).

In this matter, in support of its allegation that Ms. Pratt was late on many occasions, the employer presented both witnesses and supporting evidence. Perhaps the most significant of the documents entered into evidence was the “Last Chance Agreement” Ms. Pratt signed in May of 2009. See Referee Hearing Transcript, at 7 and Employer’s Exhibit No. 1. That agreement required Ms. Pratt to adhere to a very specific (and laborious) protocol regarding any future absences. See Referee Hearing Transcript, at 10. Her subsequent failure of performance was chronicled in three letters sent to her on August 24, 2011, September 6, 2011 and October 6, 2011 by the Deputy Personnel Administrator. See Employer’s Exhibits No. 2, 3, and 5, respectively. (N.B. — The October 6, 2011 letter (Exhibit No. 5) was in fact a notice

of termination). In these letters, the Deputy Personnel Administrator — who appeared under oath at the hearing before the Referee — specified the many dates on which Claimant violated the last chance agreement she had signed.

In her testimony, claimant did not deny she had been late. She indicated she had been very ill, the details of which need not be repeated here. See Referee Hearing Transcript, at 12 et seq. Furthermore, she attributed her illness to having been placed under the last chance agreement. See Referee Hearing Transcript, at 23. She nevertheless denied the accuracy of the list of instances of lateness, calling it “completely untrue.” See Referee Hearing Transcript, at 14.

Ms. Pratt also asserted bias on the part of her superior and presented arguments which may be deemed an allegation of vengefulness and selective enforcement. See Referee Hearing Transcript, at 13. She did concede, however, that she was placed on the last chance agreement after that supervisor left the department. See Referee Hearing Transcript, at 23. She further alleged, in substantial detail, that the department was managed politically, both as to job assignments and levels of remuneration. See Referee Hearing Transcript, at 13-14, 17-18. She felt she was treated disrespectfully, although she conceded neither her hours nor her pay were cut. See Referee Hearing Transcript, at 15, 18.

Although Ms. Pratt testified she brought her concerns regarding her treatment to the attention of her union representative, she conceded she never raised them with the department’s human resources division. See Referee Hearing Transcript, at 15.

She also indicated she never asked for medical leave, indicating that she was not properly advised by her union representative. See Referee Hearing Transcript, at 16-17.

On the basis of the record before him Referee Enos found that claimant's behavior met the proved misconduct standard. Clearly this decision was supported by reliable and substantial evidence of record. There is simply no question that this conduct went beyond an occasional aberration or a series of inadvertencies. Her failure to adhere to the work schedule set by the employer greatly diminished her value to the State. It is clear that her lateness was contrary to the employer's policies and antithetical to its interests.

Pursuant to the applicable standard of review described *supra* at 5-6, 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. 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.

Accordingly, applying this standard of review and the definition of misconduct enumerated in Turner, *supra*, I must recommend that this Court hold that the Board's finding that claimant was discharged for proved misconduct in connection with her work — by failing to appear at work in a timely manner — is supported by the record and should not be overturned by this Court.

## CONCLUSION

After a thorough review of the entire record, this Court finds that the Board of Review's decision to deny claimant unemployment benefits under § 28-44-18 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Section 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g)(5)(6). Accordingly, I recommend that the decision rendered in this case by the Board of Review be affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
Magistrate

May 16, 2012