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

Susie Soares	:	
	:	
v.	:	**A.A. No. 11 - 069**
	:	
Department of Labor & 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 on this 10th day of November, 2011.

By Order:

____/s/_____
Melvin Enright
Acting 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. Susie Soares filed the instant complaint for judicial review of a final decision of the Board of Review of the Department of Labor & Training, which held that she was not entitled to receive employment security benefits based upon proved misconduct. Jurisdiction for appeals from the decision of the Department of Employment and Training Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. 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; accordingly, I recommend that it be affirmed.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Susie Soares was employed by Payless Shoe Stores as a store manager at its East Providence location for about three years until September 15, 2010. She applied for employment security benefits and on October 4, 2010 the Director issued a decision that she was ineligible to receive benefits because she voluntarily left her position without good cause within the meaning of Gen. Laws 1956 § 28-44-17. See Director's Exhibit #2.

Complainant filed an appeal, and a hearing was held before Referee Carol A. Gibson on February 16, 2011 at which the claimant and two employer witnesses appeared. In her February 22, 2011 Decision, the referee found the following facts:

2. **Findings Of Fact:**

> The claimant had worked for this employer for a period of three years until her last day of work on September 15, 2010. The claimant was employed as a store manager for a retail shoe store. In April 2010 the District Manager issued the claimant a warning regarding tardiness. The claimant was advised that any further late openings of the store would result in her discharge. On August 20, 2010, the claimant reported to her work site late, resulting in a late opening of the store. The District Manager was informed of this issue on that date but needed documentation of the incident and approval through human resources before any action could be taken. The claimant was late as a result of childcare issues. The claimant was then late opening the store on September 15, 2010, again due to personal issues. The District Manager was not available to speak with the claimant so she was not aware of this issue. On September 16, 2010, the District Manager requested to meet with the claimant to discuss her employment. As a result of the warning in April 2010 and the late opening on August 20, 2010, the claimant was given the option of resigning or being discharged. The employer had also taken issue with the claimant failing to maintain a forty-five hour work schedule but they were unable to substantiate the dates these issues

were occurring. The claimant chose to resign and provided a letter of resignation so as not to have a termination on her employment record. The claimant did not have the option of remaining employed.

Decision of Referee, February 22, 2011 at 1. Based on these findings, the referee found that claimant had not quit voluntarily but had been forced to quit. Accordingly, she reconsidered the facts under a § 28-44-18 analysis:

> **3. Conclusion:**
> * * *
> The weight of the evidence establishes that the claimant's action of reporting to work late does rise to a degree of severity to constitute misconduct. The claimant, as a store manager, had the obligation to open the store on time. Further, it was the claimant's responsibility to make appropriate arrangements which would allow her to meet the requirements of her job. The termination resulting is under disqualifying conditions and benefits must be denied on this issue.

Decision of Referee, February 22, 2011 at 2. After doing so, Referee Gibson found claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by the employer and the matter was reviewed by the Board of Review. In a decision dated June 1, 2011, a majority of the Board found that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Assisted by counsel, Ms. Soares filed her Complaint for Judicial Review in the

Sixth Division District Court on or about June 17, 2011. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-8.1.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on disqualifying circumstances; 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, 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.

The employer bears the burden of proving through a preponderance of evidence that the claimant's action, in connection with her work activities, constitutes misconduct as defined by law.

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.

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.' "[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

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

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

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 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 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.

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

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[3] Id.

disqualified from receiving unemployment benefits due to misconduct as provided by section 28-44-18?

ANALYSIS

The issue in this case is whether claimant's instances of tardiness constituted misconduct. Ms. Soares explained throughout her testimony that her tardiness was caused by her issues with child-care for her infant daughter. Notwithstanding this fact, the Board nonetheless concluded that her instance of lateness constituted misconduct.

As explained above, this Court has consistently held that tardiness — either because the instances are excessive in number or because they were unexplained — may be deemed to constitute misconduct within the meaning of section 28-44-18. Certainly, tardiness is a serious matter for any employer. The number of instances of tardiness can be an aggravating factor, as is continuing to be tardy after warnings. Failing to call in, being a "no-call, no-show," is another potentially aggravating factor. I believe tardiness in the case of an employee that has a particularly sensitive role for the employer must also be considered. See Morrison v. Department of Employment & Training Board of Review, A.A. No. 93-118 (Dist.Ct. 1/10/1994)(DeRobbio, C.J.)(Court affirms denial of benefits to pest control firm employee who was late for appointments with customers). Because I believe Ms. Soares had such a special role, I have concluded that the Board's decision to deny her benefits is supported by

substantial, probative, and reliable evidence of record and is not clearly erroneous. I shall begin my analysis by reviewing the record of the hearing before the referee.

1. TESTIMONY BEFORE THE REFEREE

Customarily, in misconduct cases, the employer testifies first, endeavoring to meet its burden of proof. But since the Director had disqualified claimant for having voluntarily quit — a circumstance wherein the claimant bears the burden of proof — the referee began with Ms. Soares. However, given that the testimony of Ms. Soares and Ms. Diane Wales, Payless's District Manager, coincides greatly — at least as to the sequence of events — I shall interweave their testimony into a single narrative.

Ms. Soares testified that the issue of her lateness began in April of 2010. Referee Hearing Transcript, at 8. She stated that Ms. Wales had written her up for lateness and told her that if she was late one more time she would be terminated. Id. In order to avoid this eventuality, Ms. Wales gave her the alternative of taking a leave of absence or stepping down into a sales position. Referee Hearing Transcript, at 9. She declined both options for financial reasons. Id.

Ms. Soares testified that she opened late one day in late July and notified the District and Corporate offices as required; she was not disciplined on that occasion. Referee Hearing Transcript, at 9-10, 24. In response, Ms. Wales denied she had been notified by Ms. Soares that the store had opened late, particularly in July. Referee Hearing Transcript, at 25, 36. Ms. Wales specified August 20, 2010 as a date when the

store opened three minutes late. Referee Hearing Transcript, at 37. Ms. Soares agreed that the late opening she described in July could well have been on August 20, 2010. Referee Hearing Transcript, at 43. She insisted she called in but late. Referee Hearing Transcript, at 44-45. Again, Ms. Wales denied receiving notice. Referee Hearing Transcript, at 45. Instead, she testified she learned about these late-openings only a couple of weeks before Ms. Soares' separation. Referee Hearing Transcript, at 36.

In September, on a Monday, Ms. Soares notified Ms. Wales that she might have to take a couple of days off because her mother could not baby-sit, due to a death in the family. Referee Hearing Transcript, at 12. As it happened, her child's father assumed child-care responsibilities for Tuesday. Id. However, on Wednesday, Ms. Soares was about 15 minutes late. Referee Hearing Transcript, at 20. She should have been there at 9:45 A.M. in order to open at 10:00 A.M. but the store did not open until 10:04 A.M. Referee Hearing Transcript, at 20. She notified the corporate office and called Ms. Wales but was cut off before she could explain. Referee Hearing Transcript, at 11. Ms. Wales indicated she needed to speak to claimant personally. Referee Hearing Transcript, at 12-13.

When they met the next day, Thursday, at the Fall River store, claimant was late. Referee Hearing Transcript, at 13. She then told Ms. Wales that the store was opened late on Wednesday. Referee Hearing Transcript, at 27. Ms. Wales pulled out a paper and said that the matter was out of her hands, she was going to be terminated due to

tardiness. Referee Hearing Transcript, at 13-14, 18. Given the choice she resigned rather than allowing the termination to go on her employment record. Referee Hearing Transcript, at 14-15.

Regarding general matters, Ms. Soares attributed her history of tardiness to the fact that she had a half-hour commute. Referee Hearing Transcript, at 20. Ms. Wales explained that it is the responsibility of the manager or other "key-carrier" to insure the store is opened on-time. Referee Hearing Transcript, at 30-31. Ms. Wales also stated that Ms. Soares was not maintaining a 45-hour per week work schedule, as is expected of managers. Referee Hearing Transcript, at 33-34.

2. RATIONALE FOR RECOMMENDATION.

Whether claimant failed to appear for work or call-in are questions of fact. In this case claimant does not deny being late on isolated instances. She seeks instead to excuse and explain her tardiness. Her explanations were not challenged by the employer and this Court has no reason to believe they were primarily caused by any factor other than her responsibilities as a mother. Her problems are certainly not isolated or beyond the sympathy and understanding of this Court.

However, Referee Gibson and the majority of the Board focused on the fact that claimant, as a store manager, had a specific duty to insure the store was open on time. The Board could have excused her failures, finding them to be — as did the Member Representing Labor — isolated and caused by circumstances beyond her

control, and allowed benefits. On the other hand, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra pp. 5-6 and Guarino, supra p. 6, fn. 1. The scope of judicial review by the Court is also limited by General Laws 1956 § 28-44-54, which in pertinent part provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** 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.

Accordingly, I conclude that the Board's finding that claimant's failure to open the store (or cause the store to be opened) on-time after a warning constituted misconduct is supported by the record and cannot be successfully challenged. Thus, I find there is no basis for this Court to disturb the Board's decision denying benefits to Ms. Soares.

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, it is 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

NOVEMBER 10, 2011