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

Linda M. Maloni	:	
	:	
v.	:	**A.A. No. 11 - 122**
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8 -8-8.16.2 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 25th day of May, 2012.

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

Montalbano, M. Ms. Linda M. Maloni 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 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: Linda M. Maloni was employed by WPS Systems LTD of New England as a customer service representative for about seven months until December 20, 2010. She applied for employment security benefits and on February 10,

2011 the Director issued a decision that she was ineligible to receive benefits because she was discharged under disqualifying circumstances (*i.e.,* proved misconduct) in accordance with General Laws 1956 § 28-44-18. See Department's Exhibit No. 2.

Complainant filed an appeal, and a hearing was held before Referee Nancy L. Howarth on June 1, 2011 at which one employer witness appeared and the claimant appeared, represented by counsel. In her June 28, 2011 Decision, the Referee found the following facts:

> **2. Findings Of Fact:**
>
> The claimant was employed as a customer service representative by the employer. She received a written warning regarding her attendance on August 26, 2010. The claimant was absent that day and reported her absence via a text message to a co-worker. The warning indicated that the claimant must call, not text her supervisor to notify her of any absence. The claimant was absent from work on December 9, 2010, December 2010 (sic), and December 11, 2010, due to transportation problems. She received a written warning regarding her absences on December 17, 2010, which indicated that any further violations of company policy or procedures could result in immediate termination. The claimant was a no call/no show on December 19, 2010. She was terminated as of December 20, 2010 for violation of the employer's attendance policy and procedures.

Decision of Referee, June 28, 2011 at 1. Based on these findings, the referee arrived at the following conclusions:

> **3. Conclusion:**
>
> The issue in this case is whether or not the claimant was discharged under disqualifying circumstances within the meaning of Section 28-44-18 of the Rhode Island Employment Security Act.
>
> An individual who is discharged for proved misconduct in connection with the work must be held to have been discharged under disqualifying circumstances within the meaning of Section 28-44-18.

Section 28-44-18 provides, in 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 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's actions constitute a knowing violation of the employer's policy and, therefore, misconduct under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, June 28, 2011 at 2. Accordingly, the referee found claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by the employee and the matter was reviewed by the Board of Review. In a decision dated August 24, 2011, the Board unanimously 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. Maloni filed her Complaint for Judicial Review in the Sixth Division District Court on or about September 16, 2011. This matter has been referred to me for the making of findings and recommendations pursuant to General Laws 1956 § 8-8-16.2.

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, unexplained and/or excessive absences from work, has been the subject of many prior District Court decisions. This Court has long held that unexplained and/or excessive absences may constitute misconduct within the meaning of section 18. See Williams v. Department of Employment Security, A.A. No. 82-162 (Dist.Ct. 9/30/83)(Higgins, J.); Blazer v. Department of Employment Security, A.A. No. 88-30 (Dist.Ct. 8/25/88)(Moore, J.); Audette v. Department of Employment & Training, A.A. No. 91-126 (Dist.Ct. 12/11/91) (DeRobbio, C.J.). These cases are in accord with the general rule accepted nationally. See 76 AM. JUR. 2d Unemployment Compensation § 89 (2005); 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 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:

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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).

3 Id.

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

ANALYSIS

As explained above, this Court has consistently held that absences from work — either because they are excessive in number or because they were without good cause or because they were unexplained — may be deemed to constitute misconduct within the meaning of section 28-44-18. The fact that the former employee had been warned that he or she was in jeopardy and continued to be absent is regarded as an aggravating factor. The instant case falls within this line of cases. Claimant, who had been warned that her absences imperiled her position, was absent on December 18, 2010 (Tr. at 13), the very day after she had received a warning regarding her attendance (Tr. at 12). This was the fourth absence in

less than a two-week period – and thus may be deemed to constitute misconduct within the meaning of section 28-44-18.

We note for the record the Board is not constrained by the Rules of Evidence and that evidence provided from secondary sources may be relied upon by the Board/Referee to support its conclusions. See Gen. Laws 42-35-9 and Gen. Laws 42-35-10. Our concern about hearsay or second-hand testimony is therefore inapplicable to our judicial review of the Board's final decision. See DePasquale v Harrington, 599 A 2D 314 (1991).

Claimant herself testified that on December 17, 2010, she did in fact receive a warning about her absences on December 9, 2010, December 10, 2010 and December 11, 2010 (Referee Tr. at 12). Claimant herself testified that the very next day after receiving a warning about her absences she failed to report to work (Referee Tr. at 13). Finally, claimant testified that on December 20, 2010 she was notified by employer's district manager that she was terminated due to her missing days of work (Referee Tr. at 16-17). Consequently, the Referee's Findings of Fact and Conclusion that the claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18, which were adopted as the decision of the Board, were supported by reliable, probative, and substantial evidence in the record, and was not clearly erroneous or affected by error of law.

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, the Board's finding that claimant failed to appear for work after being warned about her excessive absences is supported by the record and cannot be successfully challenged.

The Board also applied the correct principle of law – that excessive absences may constitute misconduct. See precedents cited supra page 5. There is no evident reason on this record why this longstanding rule should not be applied in this case. Thus, I find there is no basis for this Court to disturb the Board's decision denying benefits to Ms. Maloni.

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 neither clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, nor is it 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 A. Montalbano
MAGISTRATE

MAY 25, 2012