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

Daniel S. Northup	:	
	:	
v.	:	**A.A. No. 12 - 004**
	:	
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 9th day of July, 2012.

By Order:

___/s/_____
Melvin Enright
Acting Chief Clerk

Enter:

___/s/_____
Jeanne E. LaFazia
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. **DISTRICT COURT**
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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. In this case Mr. Daniel S. Northup urges that the Board of Review of the Department of Labor and Training erred when it determined he could not receive unemployment benefits because he was discharged for proved misconduct. Jurisdiction for appeals from decisions of the Board of Review is vested in the District Court by 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 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.

FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Daniel S. Northup worked for Manz Automation Inc. for four and a half years as a service engineer until he was fired on August 31, 2011. He filed an application for unemployment benefits but on September 29, 2011 the Director determined him to be disqualified from receiving benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, since he was terminated for misconduct.

Complainant filed an appeal and a hearing was held before Referee Gunter A. Vukic on November 2, 2011. In his November 4, 2011 decision, the Referee held that Mr. Northup was disqualified from receiving benefits because he was terminated for proved misconduct. The Referee found the following facts:

> The claimant was a service engineer attending a training session at a company subsidiary in Taiwan when he accessed the Internet on his company provided laptop computer and posted derogatory comments focused on Germans. Employer is a German operated company doing business internationally and has employees of various nationalities including German. The posting was in violation of company policies detailed in the employee manual, effective March 1, 2010, that the claimant acknowledged receiving March 8, 2010.
>
> The claimant befriended parties including coworkers that included German workers. The employer received complaints from approximately three parties regarding the claimant's posting. The severity of the posting and the nature of the employer's business resulted in a decision to discharge the claimant.

Decision of Referee, November 4, 2011 at 1. Based on these facts, Referee Vukic came to the following conclusion:

> * * * In cases of termination, the employer bears the burden to prove by a preponderance of credible testimony or evidence that the

> claimant committed an act or acts of misconduct as defined by the law in connection with his work. It must be found and determined that the employer has met their burden.
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> In the instant case, the claimant willfully and wantonly disregarded his employer's best interests by posting what the employer considered a hateful message identifying the nationality of certain coworkers, the ownership and operators of his employer, and potential clients. Credible testimony supports that the message was read by a German coworker that the claimant befriended and at least one outside party who found it significant enough to bring it to the attention of a company Vice President. The claimant action violated a number of known company policies, rose to a level that caused the employer decision to discharge immediately and rise to a level that support denial of benefits

Decision of Referee, November 4, 2011 at 2. Claimant appealed and the matter was reviewed by the Board of Review. On December 19, 2011, the Board of Review issued a unanimous decision in which the decision of the Referee was found to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board. Decision of Board of Review, December 19, 2011, at 1.

Finally, Mr. Northup filed a complaint for judicial review in the Sixth Division District Court on January 3, 2012. Then, on February 29, 2012, a status conference was held in the case; a briefing schedule was set. Memoranda have been received from Claimant Northup and the employer, Manz Automation.

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, 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 by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.

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

[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).

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 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 (adopting the decision of the Referee) that claimant was discharged for proved misconduct within the meaning of section 28-44-18 of the Rhode Island General

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[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). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986).

Laws 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.

ANALYSIS

Upon returning from a training session in Taiwan, Mr. Northup was terminated from his position with Manz Automation because of a Facebook posting which his employer found extremely offensive. He sought to receive unemployment benefits, but, thus far, has received none, as the Director, the Referee, and the Board have all decided he should be disqualified because the posting constituted proved misconduct under section 28-44-18. In order to consider claimant's arguments I shall now proceed to (1) review the factual record in the case and (2) consider whether the facts of record do constitute proved misconduct.

1. Factual Review.

In denying his claim for benefits, the Referee (and, by implication, the Board of Review) relied on the testimony given by Ms. Lisa Dolinich, Office Manager, who testified that claimant was terminated by Wolfgang Juder,[4] Manz's Vice-President, for posting an offensive Facebook message in violation of various

[4] The Referee admitted a letter from Wolfgang Juder, Vice-President and General Manager of Manz USA. Referee Hearing Transcript, at 12-13 and Exhibit D1E. In it Mr. Juder states he was given a "screenshot" of the Facebook comment by Holger Haap, a service engineer employed at Manz's German headquarters. Mr. Juder described the comment in the harshest of terms — "The post spreads a message of hate, racism, and is disrespectful to our diverse workforce and Manz values." Finally, he enumerates the five provisions of Manz's policy handbook which he asserts Mr. Northup violated by making the posting.

provisions of Manz's code of conduct.[5] Referee Hearing Transcript, at 8. Among these are — its workplace violence prevention policy (Exhibit D1L), its computer and e-mail usage policy (Exhibit D1I), its internet usage policy (Exhibit D1J), its sexual and other unlawful harassment policy (Exhibit D1M), and its business ethics policy (Exhibit D1H). Referee Hearing Transcript, at 14-16. She explained how the comments violated each policy. Referee Hearing Transcript, at 29 et seq. She indicated Mr. Northup had received a copy of the Manz policy manual. Referee Hearing Transcript, at 16 and Exhibit D1G.

Ms. Dolinich explained that she received the posting as an e-mail from two German employees of Manz — Holger Haap and Sven Balinger. Referee Hearing Transcript, at 19-20. She did not go on Facebook to look at it herself. Referee Hearing Transcript, at 21. She claimed no personal knowledge regarding the identity of the maker of the Facebook posting, whether Claimant's Facebook page is public or private, or who else might have access to it. Referee Hearing Transcript, at 24-28. She also could not identify the computer upon which the postings had been made. Referee Hearing Transcript, at 36-37.

Claimant testified that while he was in Taiwan for training, he met a German colleague, Mr. Haap, whom he Facebook friended. Id. As the week passed, this colleague became increasingly remote. Id. On Friday, Mr. Haap and other German co-workers avoided having dinner with claimant. Referee Hearing Transcript, at 44-

[5] The Facebook posting read as follows: "SOOOO F***EN Pissed Off!!!!!!!!. Lets just say I Fucken Hate Germans These days!!!! Speaka Fucken This You Assholes!!!!" See Director's Exhibit D1F.

45. Mr. Northup ate alone, had drinks, and made the posting. Referee Hearing Transcript, at 45. He conceded he did so from his company laptop. Referee Hearing Transcript, at 55. Upon his return to Rhode Island, he was summarily discharged for making the Facebook comment. Referee Hearing Transcript, at 42, 49.

Claimant said his Facebook was private, access being limited to his "Facebook friends." Referee Hearing Transcript, at 46-47. He denied the posting was offensive. Referee Hearing Transcript, at 46.

As quoted above, in his Findings of Fact Referee Vukic found that claimant posted the comment in question from his company laptop. The finding is supported by the record — indeed, it is not truly in dispute. He concluded that the comment — which he noted was derogatory toward Germans — was considered "hateful" by the company and in violation of its standards. This conclusion is also well-supported by the record.

2. Applying the Facts to the Law.

Thus, the ultimate question we are faced with is this: Under the circumstances present in this case, does claimant's posting of the comment on his Facebook page constitute misconduct connected to his work within the meaning of section 28-44-18? We must recall when evaluating a case under a section 18 disqualification, we must answer two overarching questions:

(1) Do the claimant's actions constitute misconduct?

(2) If so, were those improper actions connected with his work?

As we shall see, I believe both questions must be answered in the affirmative in this case.

In the instant proceeding for judicial review, Mr. Northup asks this Court to reverse the Board's decision denying him benefits for three reasons: (1) The Board of Review should not have found claimant's Facebook posting constituted misconduct in light of this Court's ruling in Laura Corrieri v. Department of Labor and Training Board of Review, A.A. No. 10-114, (Dist.Ct. 12/02/10); (2) Manz's policy regarding offensive conduct had not been uniformly applied; and (3) the first amendment's free speech guarantee precludes the denial of benefits based on his Facebook posting. Manz joins issue on each of these points.

As his first theory in support of his appeal, Mr. Northup relies upon this Court's decision in Corrieri v. Department of Labor and Training Board of Review, A.A. No. 10-114 (Dist.Ct. 12/02/10). In Corrieri, an insurance company employee posted on Facebook a scandalous picture of the company's television spokeswoman. This Court reversed the decision of the Board of Review denying benefits. However, for the reasons I shall enumerate, I have concluded that Corrieri is very much distinguishable from the instant case.

In Corrieri, the Court accepted the Board's finding that the claimant's actions in re-posting the picture were offensive but decided they were not sufficiently connected to her work to trigger a section 18 disqualification. See Corrieri, supra at 9-10. In allowing benefits, the Court noted, inter alia, that Ms. Corrieri posted the picture — which was not created by her —on her personal

Facebook account and that this was done from her personal computer while she was on maternity leave. There was no indication whatsoever that she sent the picture into the company's computer network. Conversely, in my estimation, there is simply no question that Mr. Northup's comment was connected to his work — in that it related to professional colleagues with whom he was attending a training seminar.

Mr. Northup's ire, fueled by real or imagined slights, caused him to publish a comment concerning his German co-workers. He did so while on a company trip on a company computer. Although this comment was not, at least facially, directed toward his co-workers (in the sense that he did not send it to them as an e-mail), it was made in a place where it could be seen by them. Indeed, Mr. Northup had "Facebook friended" Mr. Happ just two days' prior to the posting. Accordingly, he had every reason to anticipate that Mr. Haap would see his comments. Whether he intended that result (as an indirect way to convey his displeasure) or acted in willful disregard of such an outcome is immaterial to the resolution of this case.

I believe that Mr. Northup's Facebook comment was so offensive as to be violative of objective standards of conduct.[6] I further believe it was connected to

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[6] As related above, the Referee found that Manz's management found the posting "hateful." In his letter, Mr. Juder said it contained a message of hate and racism. See Juder letter quoted supra at 7 n. 4. I cannot so readily leap to this conclusion. Whether Mr. Northup, who testified he himself is partly German, truly hates Germans or merely erupted at certain of his co-workers because his feelings were hurt is a question which, in my view, is beyond the powers of this Court to answer. For our purposes, it is sufficient to find, as I do, that his comments were so objectively offensive as to not only require his termination but to justify his disqualification from receiving unemployment benefits.

his work. As a company with a worldwide, ethnically diverse workforce, Manz has a strong interest in maintaining a workplace that is free from racial or ethnic disputes. Accordingly, I conclude that Manz is correct in asserting that Mr. Northup's actions were in "willful disregard" of his employer's business interests. I therefore recommend that this Court find that his posting constituted proved misconduct in connection with his work as defined in section 28-44-18, quoted supra at page 4.

And, because I find that Mr. Northup's posting violated objective standards of employee behavior, I need not reach the issue of whether it also violated several provisions of Manz's code of conduct. As a result, Mr. Northup's assertion that these policies were not uniformly enforced is rendered immaterial.[7] Mr. Northup's second proffered theory of error is thus rendered moot.

Finally, Mr. Northup urges that his actions could not constitute the basis for the denial of unemployment benefits due to the free speech protections afforded him by the first amendment to the United States Constitution. See Appellant's

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[7] In an effort to demonstrate that Manz did not uniformly enforce its policy manual, Mr. Northup cites an incident where another employee (Mr. Juder) e-mailed an offensive picture to a female colleague. See Referee Hearing Transcript, at 53-55. Unfortunately, he was not able to present a copy of the picture. However, this incident, even if proven, would have been, in my estimation, of doubtful probative value as proof of disparate treatment.

We must concede, sight unseen, that the picture may well have been violative of Manz's computer policies (Exhibits D1I and D1J). And while it may have violated the anti-sexual harassment policy, one could not plausibly assert that it was violative of the same document's prohibition regarding "comments based on an individual's sex, race, color, national origin, * * *." Finally, one cannot imagine how it would have been violative of workplace violence prevention policy (Exhibit D1L). Therefore, the earlier offensive incident would seem to be of doubtful precedential value on the issue of uniform enforcement.

Memorandum of Law, at 5-6. He cites Sherbert v. Verner, 374 U.S. 398, 403 (1963) for the principle that the denial of unemployment benefits can be impacted by the claimant's first amendment rights to the free exercise of religion.[8] And Claimant cites Frigm v. Unemployment Compensation Board, 164 Pa. Cmwlth. 282, 291, 642 A.2d 629, 633 (1994) for the proposition that unemployment cannot be based on the exercise of an individual's first amendment rights absent a compelling state interest. However, this doctrine has a further restriction. As Mr. Northup accurately quotes from Frigm, the doctrine may only be invoked in a case of private termination when the speech in question is related to "a matter of public concern." See Appellant's Memorandum of Law, at 5 quoting Frigm, 164 Pa. Cmwlth. At 291, 642 A.2d at 633. Frigm thus has no precedential value in the instant case, as Mr. Northup's feelings about his German co-workers do not constitute a matter of public concern. He may not therefore, interpose the first amendment as a defense to the denial of benefits.

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

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[8] And, we in Rhode Island know that the first amendment is made applicable to the states under the fourteenth amendment. See 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 n. 1, 116 S.Ct. 1495, 134 L. Ed.2d 711 (1996).

result. In my view, substantial, probative and reliable evidence — i.e., the testimony of Ms. Dolinich, the testimony and admissions of Mr. Northup, the exhibits — support the Board's finding that misconduct was proven. In sum, I believe the Board's decision that claimant's actions were in willful disregard of his employer's interests in maintaining a harmonious and civil workplace and avoiding disharmony and enmity among its employees, I must conclude that the claimant's actions do meet the section 28-44-18 standard of proved misconduct. 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 his work is supported by the record and should not be overturned by this Court.

CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review denying benefits to claimant is 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. GEN. LAWS 1956 § 42-35-15(G)(5),(6).

Accordingly, I recommend that the decision of the Board of Review be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

July 9, 2012