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

David Altman	:	
	:	
v.	:	**A.A. No. 6AA - 2012 - 00025**
	:	
Department of Labor & Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 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 27th day of August, 2012.

By Order:

__/s/_____
Stephen C. Waluk
Chief Clerk

Enter:

____/s/_____
Jeanne E. LaFazia
Chief Judge

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FINDINGS & RECOMMENDATIONS

Montalbano, M. Mr. David Altman 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 he 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 as follows: David Altman (hereinafter referred to as "claimant") was employed by LA Torrado Architect (hereinafter referred to as

"Employer") as a Junior Architect for four years and three months. During his course of employment at LA Torrado Architect, the claimant was involved in multiple altercations with his fellow co-workers—the female co-workers in particular.

The first sign of trouble was a confrontation the claimant had with a fellow co-worker, Maria Rosa, on or about April of 2009, in which Mrs. Rosa called the claimant a chauvinist and a sexist in front of the office staff. Referee Hearing Transcript, at 47-48. Some time following that incident, between April 2009 and October 2009, the claimant was involved in another conflict with a different female co-worker, Alyssa Heller. Referee Hearing Transcript, at 10. So strong was the impression that the claimant left on Mrs. Heller that she filed a charge of sexual harassment against him months after she stopped working for the Employer. See Employer Number Three, at 1. While the claim was ultimately dropped, the incident did cost the Employer substantial legal fees. Referee Hearing Transcript, at 21.

It was not just female co-workers with whom the claimant had a difficult working relationship; he was also involved in altercations with his male co-workers. Some time after Mrs. Heller's sexual harassment claim, the claimant received a serious warning from the President of the company, Louis A. Torrado, after the claimant had sent an inappropriate email to a subcontractor and had made an inappropriate comment to the senior architect during a meeting. Referee Hearing Transcript, at 45-46. Additionally, the claimant was reprimanded for keeping a log of the responsibilities of his co-workers—including those senior to him—which the claimant kept for the sole purpose of chastising

his co-workers if something went wrong. Referee Hearing Transcript, at 14-15.

On or about April 2010, the claimant was involved in yet another altercation with a female co-worker, Beverly Bradley, in which the claimant went to her desk to harass and belittle her as he had allegedly done to the previous female co-workers. Referee Hearing Transcript, at 12. Mr. Torrado met with Ms. Bradley and the claimant to go over the incident and issued a warning to the claimant. Referee Hearing Transcript, at 12; Employer Number One, at 1. Approximately one year after the incident with Ms. Bradley, during April 2011, Mr. Torrado witnessed first-hand the claimant's attitude towards his fellow co-workers, which caused Mr. Torrado to sit down with the claimant to warn him a third time and to see if he could help the claimant overcome his inability to behave professionally towards others. Referee Hearing Transcript, at 50. One week after receiving the warning, the claimant was involved in another altercation with a female co-worker (ostensibly while he was trying to help her learn a piece of software) that caused her to run out of the building in tears. Referee Hearing Transcript, at 11. The Employer had seen enough and terminated the claimant for misconduct. Referee Hearing Transcript, at 12.

The claimant applied for employment security benefits and on April 21, 2011 the Director issued a decision stating that the claimant was eligible to receive benefits because he was not discharged under non-disqualifying circumstances (i.e., proved misconduct) in accordance with Gen. Laws 1956 § 28-44-18. See Department Number Two.

The Employer filed an appeal, and a hearing was held before Referee Paul Whelan

on June 27, 2011. Louis Torrado, acting as the Employer's representative, Beverly Bradley, acting as the Employer's witness, the claimant, and the claimant's counsel were all present at the hearing. On September 20, 2011 Referee Whelan determined that the claimant had been terminated under disqualifying reasons (i.e., he was terminated due to misconduct) and reversed the Director's decision. Decision of Referee, September 20, 2011 at 2.

On September 27, 2011, the claimant filed a timely appeal with the Board of Review (hereinafter the "Board"). The Board issued a decision on December 27, 2011 affirming Referee Whelan's decision and adopting it as their own. In adopting Referee Whelan's decision, the Board determined that the claimant was disqualified from receiving unemployment benefits because the claimant had been terminated under disqualifying circumstances due to his perceived misconduct. Decision of Board Review, at 1.

Thereafter, on January 24, 2012, the claimant filed a timely statement of appeal to the District Court. 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 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 interest 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 the law.

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 decisions 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

[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).

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 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 that claimant was disqualified from receiving benefits due to misconduct 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

This Court has previously held that if an employee establishes a pattern of misbehavior, and the employer warns the employee about such misbehavior, that it may

[3] Id.

be deemed to constitute misconduct within the meaning of Gen. Laws 1956 § 28-44-18. See Maloni v. Department of Labor & Training, Board of Review, A.A. No. 11-122 (Dist.Ct. 05/25/12) (Montalbano, M.) (holding that an employee's absence from work following a warning by her employer that her employment was in jeopardy due to a history of absences constituted misconduct). See also DeLuise v. Department of Labor & Training, Board of Review, A.A. No. 2012-095 (Dist.Ct. 05/29/12) (Ippolito, M.) (holding that an employee's repeated inappropriate conduct towards his co-workers after being warned constituted misconduct). The claimant had been warned numerous times by the Employer regarding his attitude towards his co-workers, and the claimant's continued pattern of misbehavior towards his co-workers in direct contradiction to the Employer's wishes falls squarely within the definition of misconduct under Gen. Laws 1956 § 28-44-18.

The Employer testified that the claimant was involved in altercations with four different women over the course of the claimant's employment (one such incident even led to a sexual harassment complaint before the Rhode Island Commission for Human Rights). Employer Number Three, at 1. The Employer brought to the hearing one female employee so that she would serve as first-hand testimony to an altercation that she had with the claimant and to serve as second-hand testimony to an altercation that the claimant had with a different female employee. Referee Hearing Transcript, at 12. The Employer also testified as to altercations the claimant had with male co-workers and stated that he had witnessed the claimant's "toxic behavior" for himself. Referee Hearing

Transcript, at 11, 14-15. The Employer also presented evidence—which the claimant did not refute—that the Employer had warned the claimant on at least three separate occasions regarding his behavior towards his co-workers. Employer Number One, at 1; Referee Hearing Transcript, at 64. Based on this evidence, the Board found that the claimant was fired due to misconduct that manifested itself in a negative "pattern of behavior" towards his co-workers, and the female co-workers in particular. Decision of Board of Review, at 1.

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 1956 § 42-35-9 and Gen. Laws 1956 § 42-35-10. It is true that a good portion of the Employer's evidence is hearsay; however, it should be restated that this Court's only concern is whether or not there is reliable, probative, and substantial evidence to support the Board's decision. Concerns about hearsay or second-hand testimony are inapplicable to our judicial review of the Board's final decision. See DePasquale v. Harrington, 599 A.2D 314, 316-17 (1991). Stated differently, the only concern for this Court is whether the Employer presented enough testimony and evidence that if believed would establish misconduct on the part of the claimant. Due to the length of the testimony, the clear pattern it establishes, and the two witnesses who testified on behalf of the employer, this Court finds that the Board had sufficient legally competent evidence to support its decision.

The claimant cites a previous decision by this Court, Archway, Inc. v. Department

of Labor and Training, Board of Review, A.A. No. 01-03, in support of his claim. In Archway, the employee was fired following a confrontation with her manager. The employer claimed that the employee had been warned four times due to an unsatisfactory work record, and that the employee had been fired because she became abusive during the confrontation. The employee denied that she ever received a warning or that she became abusive during the confrontation with her manager. The Board held that the employer had failed to meet its burden of proof in establishing misconduct, based partly on the fact that the employer had not seen the altercation with the manager, nor had the employer presented evidence that the employee had been previously warned. This Court affirmed the Board's decision.

This case is distinguishable from Archway in several key aspects. Unlike Archway, where the employer failed to present evidence of a pattern of misbehavior, the Employer has presented testimony from various sources spanning multiple years about the claimant's misbehavior. Unlike Archway, where the employee denied being warned, the claimant admitted to the Referee that he had been warned by the Employer on numerous occasions. Finally, unlike Archway, where the employer did not provide direct testimony, the Employer in this case directly witnessed and attested to the claimant's pattern of misconduct. In sum, Archway is distinguishable from the case at bar.

The claimant states that his misbehavior was not misconduct because his motive was not to be rude or to act in an unprofessional manner; indeed, the claimant states that he was actually trying to be helpful to his co-workers when he made his controversial

comments. However, the law is clear on this: Misconduct will be found where the employee's actions against his employer's interest are of such "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design." Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984). The claimant knew that his demeanor was offensive, and the claimant had been warned by the Employer on numerous occasions, yet the claimant continued to be involved in the same type of incident "over and over again." Referee Hearing Transcript, at 21, 63-64. Even if the claimant was not acting with the intent to demean and harass his female co-workers, the reoccurrence of the incidents is of such a pattern as to manifest a wrongful intent by the claimant to willfully disregard his employer's interests. Thus, the Board had a sufficient basis for finding misconduct on the part of the claimant—regardless of the claimant's perceived intent.

The Employer presented enough legal evidence for the Board to find that the claimant was fired due to misconduct. Additionally, the claimant has failed to bring forward a good argument as to why the Board's decision was clearly erroneous. Accordingly, because the Board applied the correct principle of law, this Court will not substitute its judgment for that of the Board even though a reasonable fact-finder may have reached a contrary result.

CONCLUSION

Upon a thorough review of the entire record, this Court finds that the Board's decision to deny claimant unemployment benefits under Gen. Laws 1956 § 28-44-18 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence of the whole record." § 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion." § 42-35-15(g)(5)(6).

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

___/s/_____
Joseph A. Montalbano
Magistrate
August 27, 2012