STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Robert F. DeLuise	:	
	:	
v.	:	**A.A. No. 12 - 095**
	:	
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 at Providence on this 29th day of May, 2012.

By Order:

/s/

Melvin Enright

Acting Chief Clerk

Enter:

/s/

Jeanne E. LaFazia

Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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Department of Labor and Training,	:	
Board of Review	:	

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 the instant complaint Mr. Robert F. DeLuise urges that the Board of Review of the Department of Labor & Training erred when it held that he was not entitled to receive employment security benefits because he had been discharged for 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 Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making for 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. Robert F. DeLuise worked for the Newport Harbor Association as the executive chef at its restaurant called "The Mooring" for seven months — until November 3, 2011. He applied for unemployment benefits but on December 16, 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 — specifically, inappropriate conduct toward associates.

Complainant filed an appeal and a hearing was held before Referee Gunter A. Vukic on January 24, 2012. Claimant appeared as did an employer representative. On February 1, 2012, the Referee held that Mr. DeLuise was disqualified from receiving benefits because misconduct had been proven. In his written decision, the Referee found the following facts:

> * * *
> The claimant worked as the executive chef. The claimant was warned regarding his conduct with subordinates during work time. After having been counseled, the claimant continued with his intimidating manner and had pulled down an employee's pants on more than one occasion. The claimant acknowledged inappropriate action but said that it was not meant to be intimidating; it was done in good humor. Claimant was discharged.

Decision of Referee, February 1, 2012 at 1. Thus, claimant admitted the conduct, but demurred that it was meant to be humorous. Based on the facts he had found, Referee Vukic formulated the following conclusion:

> * * *

> In cases of termination, the employer bears the burden to prove by 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.
>
> The credible testimony supports the continued inappropriate behavior on the part of the claimant after having been issued written warnings.
>
> Therefore, I find and determined (sic) that the claimant was discharged under disqualifying circumstances and benefits are denied.

Decision of Referee, February 1, 2012 at 2.

Mr. DeLuise appealed and the matter was reviewed by the Department of Labor and Training Board of Review. On March 21, 2012, the members of the Board of Review unanimously held 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. Finally, Mr. DeLuise filed a complaint for judicial review in the Sixth Division District Court.

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 Board as to the weight of the evidence on questions of

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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).

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 that claimant was disqualified from receiving benefits due to misconduct

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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).

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

For a discharged worker to be denied unemployment benefits, two fundamental questions must be answered in the affirmative: (1) Were the actions alleged such as may be properly deemed misconduct within the meaning of section 28-44-18 and the definition of misconduct adopted by the Supreme Court in Turner? (2) Were these alleged actions proven by the employer? After reviewing the entire record presented to the Court in this case, I believe the Board's decision that the employer met its burden of satisfying both questions was not clearly erroneous. As a result, I shall recommend its affirmance by this Court.

The claimant was alleged to have touched a fellow worker in a manner that was patently offensive, likely tortious, and possibly criminal. In my view his conduct was, in the language of the Rhode Island Supreme Court, in "disregard of [the] standards of behavior which the employer has the right to expect of his employee." Turner, 479 A.2d at 741. This Court has long held that assaulting a co-worker is behavior that falls within the definition of misconduct. See Tapia v. Department of Employment Security Board of Review, A.A. No. 93-222 (Dist.Ct. 4/6/95) (DeRobbio, C.J.)(Board found claimant, who was discharged for arguing and fighting with co-worker not entitled to benefits; Affirmed). This rule has been applied even when the assault occurred after work hours. See

Volpe v. Department of Employment Security Board of Review, A.A. No. 80-260 (Dist.Ct. 3/29/82)(Trumpetto, J)(Denial of benefits affirmed where claimant assaulted co-worker after-hours, just-off employer's premises, and attack was work-related). These Rhode Island precedents are in accord with the national view. See 76 Am. Jur. 2d Unemployment Compensation § 83 (2012).

We may now turn to the second issue — the issue of proof.

In finding that Mr. DeLuise was fired for proved misconduct, the Board could rely on the testimony of Kristin Fahey, who testified that Mr. DeLuise, who had previously received a "final warning," was fired on November 1, 2011 because of a detailed written complaint that she had received from a subordinate — the kitchen supervisor. Referee Hearing Transcript, at 7 and Employer's Exhibit 1. Ms. Fahey testified that — when she and another supervisor met with him — Mr. DeLuise admitted to "pantsing" the employee, indicating that it "was meant in fun and joking around." Referee Hearing Transcript, at 7. After the supervisors consulted with the chief operating officer, Mr. DeLuise was terminated. Referee Hearing Transcript, at 8.

In response, Mr. DeLuise testified that the employee in question was one with performance issues — a person that management had indicated to him had to be "performance managed." Referee Hearing Transcript, at 11. He indicated that he was fired for other reasons and that the allegations of "pantsing" were false. Referee Hearing Transcript, at 12-13. He further denied that he admitted such conduct to Ms. Fahey. Referee Hearing Transcript, at 14. He alleged that

the employee had "space issues" — *i.e.,* discomfort with people being in proximity to him. Referee Hearing Transcript, at 13.

In rebuttal testimony, Ms. Fahey reiterated that Mr. DeLuise admitted to the facts of the "pantsing" incident. Referee Hearing Transcript, at 15.

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.

In this case the Referee heard an allegation that Mr. DeLuise had touched a co-worker in a patently offensive manner. The Referee heard testimony that Mr. DeLuise admitted doing so, but pled an innocent motive. In giving credence to Ms. Fahey's testimony regarding the admission, the Referee acted within his sound discretion — notwithstanding his sworn denial at the hearing. Accordingly, applying the 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 — physically touching a co-worker in an offensive manner — is well-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 in this matter 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; nor is it arbitrary or capricious. 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

May 29, 2012