STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**
SIXTH DIVISION

Jennifer E. Carvalho	:	
	:	
v.	:	**A.A. No. 13 - 037**
	:	
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 16th day of December, 2013.

By Order:

/s/
Stephen C. Waluk
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. Jennifer E. Carvalho 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 — specifically, repeated tardiness. 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. 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.

I. FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Jennifer E. Carvalho was employed by Roger Williams University for more than nine years as a program coordinator until she was terminated for tardiness on August 4, 2011. She applied for employment security benefits immediately but on October 12, 2011 a designee of the Director of the Department of Labor and Training found that she had not shown that her tardiness for good cause; as a result, the Director's decision held that she was disqualified from receiving benefits due to misconduct as provided in Gen. Laws 1956 § 28-44-18. See Director's Exhibit No. 2.

Claimant filed an appeal and a hearing was scheduled before Referee Nancy L. Howarth on November 16, 2011 at which the claimant appeared with counsel, as did counsel for the University. In her November 18, 2011 Decision, Referee Howarth found the following facts on the question whether claimant was fired for misconduct:

> **2. Findings Of Fact:**
>
> The claimant was employed as a program coordinator by the employer. On February 7, 2011, the claimant's physician informed the employer that due to a medical condition, the claimant was temporarily disabled. The claimant was granted an FMLA leave beginning January 1, 2011. She returned to work for one day in April of 2011 and left work again, due to the same issue. She returned to work on May 5, 2011. The claimant's treating physician had provided a release dated April 6, 2011, which indicated that as of that date the claimant was able to return to work full-time, full duty. At the employer's request the claimant agreed to be examined by a physician chosen by the employer. On July 11, 2011 this physician confirmed that the claimant was able to perform her job

> duties, as outlined in her job description. Prior to her leave the claimant had been tardy an excessive number of times, in violation of the employer's attendance policy. Subsequent to her return to work, her tardiness continued. The claimant had received warnings regarding her tardiness on April 14, 2010, November 22, 2010, May 26, 2011 and June 24, 2011. She was warned that she must report to work at her scheduled start time and that continued tardiness would result in further disciplinary action, up to and including termination. Despite the two medical opinions, the claimant maintained that her tardiness was a result of her medical condition, which caused her to be extremely fatigued each morning. The claimant was terminated on August 4, 2011, due to chronic tardiness and failure to perform her job duties properly and adequately.
>
> The claimant has failed to provide any medical records which demonstrate that she was medically unable to report to work due to work (sic) in a timely manner subsequent to April 6, 2011.

Decision of Referee, November 18, 2011 at 1-2. Based on these findings, the Referee concluded that, in the absence of any medical documentation providing a medical excuse, Claimant's tardiness constituted misconduct and she would be disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18.

Thereafter, a timely appeal was filed by Ms. Carvalho and the matter was reviewed by the Board of Review. In a decision dated January 18, 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; the Decision of the Referee was thereby affirmed.

Ms. Carvalho filed an appeal within the Sixth Division District Court on

February 9, 2012. The case was designated 6AA-2012-0036. On October 15, 2012 this Court vacated the decision of the Board of Review and remanded the matter for further hearing. See two-page Order entered on October 15, 2012. That hearing was conducted by the Board on January 7, 2013.

On January 25, 2013 the Board of Review issued a second decision. After presenting the travel of the case in some detail, the Board made the following Findings of Fact:

> The Findings of Fact contained the Referee's Decision are affirmed and incorporated into this Decision as if fully set forth herein; provided, however, the Board makes the following additional findings: at the time the claimant was separated from her position, she did not have a physician's letter stating that she had a medical condition that caused her to come in late; the claimant had no medical documentation that she needed an accommodation. The employer has a policy (employer exhibit #11) which requires its employees to report to work on time. The claimant was aware of the policy, having a number of conversations with her employer regarding her tardiness. The policy provides for disciplinary action "up to and including termination."

Decision of Board of Review, January 25, 2013, at 2. With these expanded findings in hand, the Board made the following conclusion:

> As the Referee noted, the issue is whether the claimant's was discharged under disqualifying circumstances within the meeting of Section 28-44-18 of the Act. Section 28-44-18 provides, in part, as follows:
>
> > 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.
>
> The record evidence (Referee and Board) established that the claimant was continually late arriving for work. The employer and the claimant had discussed the claimant's tardiness on several occasions. However, the situation did not change. The claimant had a note from her physician stating that she was fit for work, without limitation. The claimant kept coming in late citing the fact that she was suffering from fibromyalgia. She had no medical documentation stating that her condition caused her to be tardy nearly every day. Based on the lack of medical documentation, the only reasonable conclusion is that the claimant knowingly violated a reasonable and uniformly enforced rule, and her actions in consistently coming in late constitute deliberate conduct in willful disregard of the employer's interest. The employer has proved misconduct.

Board of Review Decision, January 25, 2013, at 2. In light of these findings, the Board of Review found Claimant to be disqualified from the receipt of benefits. Id.

Claimant filed a second complaint for judicial review in the Sixth Division District Court on February 28, 2013. A conference was held and a briefing schedule set. Then, on October 23, 2013, the Claimant filed a motion to expand the record, which was denied on December 3, 2013 because the District Court has no authority to expand the Record on appeal. See Gen. Laws 1956 § 28-44-54.

This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1.

II. 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 — repeated tardiness — has been held to constitute misconduct justifying disqualification from the receipt of benefits in District Court cases too numerous to cite. This has also been the view expressed nationally. ANNOT., Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674.

III. 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 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 Gen. Laws 1956 § 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).

> * * * 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.

IV. 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?

V. ANALYSIS

For the following reasons I conclude that the Board of Review's decision in this case was supported by substantial evidence of record and is not clearly erroneous. As I shall explain, I arrive at this conclusion on the grounds that Ms. Carvalho was

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[3] Id.

repeatedly late for work. I therefore recommend that the Board's decision denying benefits be affirmed.

The facts here are not in serious dispute and do not require a narrative of the testimony given at the two hearings conducted by the Referee and the Board of Review (upon remand). Claimant was sick and was out on FMLA early in 2011. She cooperated with an examination by a physician chosen by the Board.

At the hearing before Referee Howarth, Ms. Carvalho testified that she came back to work on May 5, 2011, with no medical restrictions from her physician. Referee Hearing Transcript, at 11. Thereafter, she was repeatedly late. Her supervisor, the Dean of Students, sent her an e-mail inquiring if there was a reason she was late each day from June 12 through June 24, 2011. See Employer's Exhibit 5, E-Mail from Assistant Dean Lalli to Claimant, dated June 24, 2011. Another e-mail of similar tenor had been sent in late November of 2010. Referee Hearing Transcript, at 14-15 and Employer's Exhibit 7, E-Mail from Assistant Dean Lalli to Claimant, dated November 22, 2010. And a Memorandum was sent to her in April of 2010. Referee Hearing Transcript, at 15 and Employer's Exhibit 8. The University's attendance policy was also admitted, without objection. See Referee Hearing Transcript, at 15 and Employer's Exhibit 11.

At the hearing before the Board the history of Claimant's tardiness was again laid out in great detail. However, Claimant was unable to take advantage of the

opportunity given to her by this Court when it remanded the instant case by proffering a medical opinion that her tardiness was linked to her illness.[4] To the contrary, the only medical opinions in the record are those indicating that she could return to work in May of 2011 and be fully functional. And so, the Board of Review reinstituted its previous disqualification of Claimant.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws 1956 § 42-35-15(g), supra at 6 and Guarino, supra at 8, n. 1. In other words, the role of this Court is not to choose which version of events – the employer's or the claimant's – is more credible; instead, it is merely to determine whether the Board's decision, in light of the evidence of record, is clearly erroneous. Based on my review of the record, including the testimony given at the hearing before the Referee — which I have summarized — I believe it is not.

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

[4] We may also note that the document Ms. Carvalho wished to be received by this Court pursuant to her Motion to Enlarge the Record would not have performed this function either. Doctor Leibowitz's June 27, 2013 letter did not speak to her condition at times relevant to the instant case and, in any event, merely stated that

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
DECEMBER16,2013

her fibromyalgia could be causing her lateness, not that it was causing it.