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

Tiffany Norton	:	
	:	
v.	:	**A.A. No. 13 - 179**
	:	
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, 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 REVERSED.

Entered as an Order of this Court at Providence on this 18th day of February, 2014.

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. In this case Ms. Tiffany Norton urges that the Board of Review of the Department of Labor and Training erred when it found her to be disqualified from the receipt of unemployment benefits due to misconduct pursuant to Gen. Laws 1956 § 28-44-18.

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 of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. After a review of the record, I find that the employer did not sustain its

burden of proving misconduct. And, for the reasons that follow, I recommend that the decision rendered by the Board of Review in this case be REVERSED.

I
FACTS AND TRAVEL OF THE CASE

The travel of the instant case may be briefly stated: Ms. Norton worked for Lifetouch Portrait Studios for nine years as a photographer. She applied for benefits immediately but on June 26, 2013 a designee of the Director of the Department of Labor and Training issued a decision finding her to be disqualified from receiving further benefits because she was fired for proved misconduct as defined in Gen. Laws 1956 § 28-44-18. See Decision of Director, June 26, 2013, at 1, contained in the record as Exhibit D2. She appealed from this order and a hearing was scheduled before Referee William Enos on August 6, 2013.

Claimant appeared alone, without counsel, but the employer did not appear at all. The hearing consisted of the Referee questioning the Claimant. The Claimant denied she had a history of lateness. However, the Referee made the following Findings of Fact regarding her discharge:

> The claimant worked as a Photographer for Lifetouch Portrait Studios, Inc., for 9 years, last on June 5, 2013. The claimant was discharged for violating the company's attendance policy. The employer submitted evidence to the Department of Labor and Training that showed the claimant had been progressively warned. The claimant stated that she was going through some

> personal issues at the time but only was tardy by a few minutes each time and would always call.

Decision of Referee, August 8, 2013, at 1. Based on these findings, the Referee issued the following conclusions:

> I find from the evidence presented that the claimant was terminated under disqualifying circumstances. Based on this conclusion, I find the claimant is not entitled to Employment Security benefits under Section 28-44-18 of the Act.

Decision of Referee, August 8, 2013, at 2. Accordingly, the Referee found her to be ineligible to receive unemployment benefits, pursuant to § 28-44-18. Decision of Referee, August 8, 2013, at 3.

Ms. Norton appealed and the Board of Review considered the matter. In a decision dated September 20, 2013, a majority of the members of the Board of Review held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto; as a result, the majority affirmed the decision of the Referee. Decision of Board of Review, September 20, 2013, at 1. However, the Member Representing Labor dissented, commenting that the evidence was insufficient and that the employer had failed to sustain its burden of proof when it did not appear at the hearing. Id.

Ms. Norton then filed a timely complaint for judicial review in the Sixth Division District Court.

II

APPLICABLE LAW – DISQUALIFICATION FOR MISCONDUCT

Under § 28-44-18 of the Rhode Island Employment Security Act, "an employee discharged for proven misconduct is not eligible for unemployment benefits if the employer terminated the employee for disqualifying circumstances connected with his or her work."[1] With respect to proven misconduct, § 28-44-18 provides, in pertinent 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 Rhode Island Supreme Court has adopted a general definition of the term "misconduct," holding as follows:

> " '[M]isconduct' * * * 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 employer's interest or of the employee's duties and employer's interest or of

[1] Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

> 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."

Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984) citing Boynton Cab Co. v. Newbeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941). In cases of discharge, the employer bears the burden of proving misconduct on the part of the employee in connection with his or her work.[2]

Historically, for a claimant's behavior to be defined as misconduct under section 18, it had to be inherently evil or wrong — "deliberate conduct in willful disregard of the employer's interest." Gen. Laws 1956 § 28-44-18, quoted supra at 5. Under this provision, all types of bad behavior in the workplace have been found to constitute disqualifying misconduct — conduct that would also be criminal, such as theft and assaults, and other patently offensive behavior, such as insubordination.

However, in 1998 the legislature broadened the definition of misconduct to include the violation of a uniformly enforced work rule.[3] Now, misconduct

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[2] Foster-Glocester Regional School Committee, supra, 854 A.2d at 1018.

[3] See P.L. 1998, ch. 369, § 3 and P.L. 1998, ch. 401, § 3.

may be alternatively defined as "… a knowing violation of a reasonable and uniformly enforced rule or policy of the employer."[4] Thus, proved misconduct may now consist of — (1) traditional misconduct, as defined in Turner, and (2) the intentional violation of a work rule.

III

STANDARD OF REVIEW

The standard of review by which this court must consider appeals from the Board 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] See § 28-44-18. In other words, misconduct under section 18 now includes within its ambit behavior that would be fairly regarded as patently offensive and conduct that would not be, so long as it is prohibited by an office rule that has been uniformly enforced. The two forms of misconduct can be analogized (roughly to be sure) to the division of crimes into those that are considered malum in se (inherently wrong) and those described as malum prohibitum (unlawful because they have been proscribed by an act of the legislature).

> (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.' "[5] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[6] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[7]

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

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[5] 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).

[6] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[7] 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).

> 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
ANALYSIS

It is well-settled in Rhode Island that a pattern of tardiness can, if proven, constitute disqualifying misconduct within the meaning of § 28-44-18. But, in many cases the result turns on the quality of the evidence and testimony. In this case, there was none.

As mentioned above, the employer in this case failed to appear at the hearing conducted by the Referee. As recently discussed in Beth Dwares v. Department of Labor and Training, Board of Review, A.A. No. 12-53 (Dist.Ct. 2014), this circumstance could cause us to inquire whether the employer sustained its burden of proof and whether constitutional notions of due process were violated. But I shall not travel down that path in this case. Instead, I shall simply review the case on the merits and determine whether misconduct was proven. Doing so, I conclude that it was not.

Quite simply, when the employer did not appear, the Referee considered the contents of the file transmitted to the Board of Review by the Department. Among the items in that file, now certified to this Court, are "warnings" apparently[8] received by the Claimant from her employer. The last warning was issued on January 22, 2013. Prior warnings from May and July of 2012 are also present in the file. But there was no report of any "final" instance of tardiness that prompted her termination in early June of 2013. As a result, Claimant cannot be said to have been fired "for" lateness.

And so, viewing the exhibits in the light most favorable to the employer, the evidence was insufficient, as a matter of law, to prove misconduct. As a result, I must recommend that the decision of the Board be reversed.

IV
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, the instant decision was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

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[8] I say "apparently" because the items were never authenticated, since the employer presented no witnesses at the hearing.

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

/s/
Joseph P. Ippolito
Magistrate

February 18, 2014