STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Janeth Ramos Palomar	**:**	
	:	
v.	**:**	**A.A. No. 13 - 208**
	:	
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 except that the Order of Repayment shall be modified as outlined in the attached opinion.

Entered as an Order of this Court at Providence on this 11th day of July, 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. Ms. Janeth Ramos Palomar 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. 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.

I
FACTS & TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Janeth Ramos Palomar worked for Marion Manufacturing for fourteen years until she was terminated on July 9, 2013. She re-filed a claim for unemployment benefits but on September 27, 2013, a designee of the Director of the Department of Labor and Training determined her to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because she was terminated for proved misconduct.

The Claimant filed an appeal and a hearing was held before Referee John R. Palangio on October 29, 2013. The same day, the Referee held that Ms. Palomar was disqualified from receiving benefits because the employer had proven she had been fired for misconduct. In his written Decision, the Referee made Findings of Fact, which are quoted here in their entirety:

> The claimant was an interior designer for Marion Manufacturing for fourteen years last on July 9, 2013. The claimant was told the previous day by her employer that her hours were to be cut from eight to six hours per day as a result in decreased orders. The claimant and her daughter met with the owner later that day. The meeting resulted in an argument where the claimant and her daughter yelled at the owner in the owner's office and on the floor of the business in front of other employees (one of which appeared at this hearing). The claimant threatened the owner with a law suit and alleged

> discrimination for cutting her hours. As a result of the outburst, the claimant was terminated for insubordination.

Decision of Referee, October 29, 2013 at 1. Based on these facts — and after quoting extensively from Gen. Laws 1956 § 28-44-18 and the leading case in this area, Turner v. Department of Employment and Training Board of Review, 479 A.2d 740 (R.I. 1984) — the Referee pronounced the following conclusions:

> * * *
>
> 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 her work.
>
> The employer did have a legitimate reason for temporarily reducing the claimant's hours. The employer was able to show that the actions of the claimant exhibited misconduct. The employer's testimony and that of her witness show that the claimant became argumentative toward the owner, raised her voice to her and threatened a law suit in front of other employees. The claimant's actions were in violation of a standard of behavior which the employer has a right to expect from her employees. As a result, Unemployment benefits are denied under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, October 29, 2013 at 3. The claimant appealed and the Board of Review deliberated on the matter.

On December 11, 2013, the Board of Review unanimously affirmed the decision of the Referee — finding it to be a proper adjudication of the

facts and the law applicable thereto; the Board adopted the decision of the Referee as its own.

Finally, Ms. Palomar filed a complaint for judicial review in the Sixth Division District Court on December 18, 2013.

II
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.

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

[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).

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.

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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). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

IV
ISSUE

The issue before the Court is whether the decision of the Board of Review (adopting the decision of the Referee) 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.

V
ANALYSIS

At each step of the administrative process for the adjudication of unemployment claims that is jointly maintained by the Department of Labor and Training and its Board of Review, Ms. Palomar's claim has been denied. Her conduct was found to be unprofessional. After a detailed review of the facts of record, I shall provide the rationale for my recommendation that the decision of the Board of Review ought to be affirmed.

A
Factual Review

At the hearing before the Referee the employer presented three representatives — (1) Ms. Jean M. Conca, Marion Manufacturing's President and Owner; (2) Mr. Richard Conca, its Vice-President; and (3) Ms. Marie Silva, Ms. Conca's secretary. Referee Hearing Transcript, at 9. Of these, the primary witness was Ms. Conca. Referee Hearing Transcript, at 16 et seq. She

explained that she met with Ms. Palomar on Monday, July 8, 2013, to tell her that her work-hours were going to be temporarily reduced from eight to six hours per day due to a lack of work-orders for the type of product Ms. Palomar specialized in making. Referee Hearing Transcript, at 18-19. Ms. Palomar understood, suggesting that she might try to collect (unemployment, one presumes) for the difference. Referee Hearing Transcript, at 19.

But a brief time later, Claimant returned with her daughter, who also worked for Marion. Id. Ms. Conca described what happened next —

EMP1: … they started to yell at me, ah, point the fingers in my face, um, they were saying that, um, it was unfair that I cut, they both said it, that I cut her, ah hours, not anybody else's hours. And I explained that the work in her area had slowed down, that it was temporarily, um, you know, temporarily there hadn't been as much.

REF: Okay. Okay.

EMP1: Um, then they both continued to yell at me, point the fingers at me. I had to ask them to leave. Um - - -

REF: What were some of the things they were saying?

EMP1: That I didn't know how to run a business, that I was, that I will be losing customers, um, I didn't know what I was doing. Um, stood while I was sitting and did this. Um, I asked them to leave. They proceeded onto the floor where I had other workers. And then both in Spanish and in English continued this. Um, again, I asked them to leave. Janeth then took her daughter, started to leave, swore at me out the door - - -

REF: What did she say - - -

EMP1: And then they - - all different profanities. They just - -

REF: In English or in Spanish - -

EMP1: Both. …

Referee Hearing Transcript, at 19-20. Claimant also threatened to sue for discrimination. Referee Hearing Transcript, at 21.

Ms. Silva corroborated this narrative and the fact that voices were raised and fingers were pointed. Referee Hearing Transcript, at 23 et seq. She also confirmed that the argument spilled out onto the floor. Referee Hearing Transcript, at 24.

At this point Ms. Conca continued her story, with testimony that the next day she terminated Ms. Palomar because of the behavior directed toward her — particularly that done in front of other employees. Referee Hearing Transcript, at 25. She testified that she had never had previous occasion to discipline Ms. Palomar — except for minor matters. . Referee Hearing Transcript, at 26.

Then, Ms. Palomar testified, with her daughter providing translation. Referee Hearing Transcript, at 27. She told Referee Palangio that she accepted the drop in hours, though she wanted to try to collect unemployment for her lost wages. Id. She only became "a little" upset when she overheard a co-worker saying Ms. Conca was going to train somebody else on her job. Id.

She then approached her daughter for help in going to speak with Ms. Conca. Referee Hearing Transcript, at 28.

They went to Ms. Conca's office and were admitted. Id. She asked if she could work eight hours Monday through Thursday, instead of six hours Monday through Friday, which was denied. Id. She then asked if she could make up the eight hours in another department, which was also denied, on grounds that the Claimant was incapable of working in other areas. Referee Hearing Transcript, at 29. At this point her daughter, who was interpreting at the meeting, became upset, and expressed incredulity at the questioning of her mother's ability. Id. At this juncture, Ms. Conca directed Ms. Palomar to leave and return tomorrow. Id.

The Claimant also explained — in answer to a question posed by the Referee — that when she and her daughter left the office they were upset but her mother did not speak to anyone. Referee Hearing Transcript, at 29-30. She also denied threatening lawsuits. Referee Hearing Transcript, at 30-31. And she denied raising her voice. Referee Hearing Transcript, at 31.

The Claimant's daughter, Ms. Castano, who interpreted for her mother during the meetings at Marion and during the Referee hearing, also testified as a witness for her mother. Referee Hearing Transcript, at 31. She testified that when they met with the owner she asked if there was any way her mother

could make up the hours. Referee Hearing Transcript, at 31-32. That's when she was told her mother was incompetent to perform other duties. Referee Hearing Transcript, at 32. At this point she became aggravated, and left the office because she did not want to "lash out." Id. After she left, her mother said something to Ms. Conca, but she could not hear what. Id.

Then Ms. Palomar posed a question — Why, if her behavior was so bad, did the employer wait till the next day to fire her? Referee Hearing Transcript, at 33. Ms. Conca responded that she wanted to dissolve the situation, which she called "heated." Id.

Ms. Palomar then gave her version of what happened the next day. Referee Hearing Transcript, at 34. She went in; everything was fine until, at the end of the day, she was terminated. Id. She was hysterical. Id.

Then, Ms. Conca denied she ever called Ms. Palomar incompetent or questioned her ability learn other things. Referee Hearing Transcript, at 35. And she stated that she did believe in cross-training employees, so that people could fill in if someone, for example, had the flu. Id.

With regard to the overpayment, Ms. Palomar indicated that she told the Department she was filing due to "lack of work" because of her original cut in hours. Referee Hearing Transcript, at 38. She stated she was fired after she originally filed. Id.

B

Discussion

In the record of this case (i.e., the transcript of the hearing before the Referee and the other materials certified to this Court) one finds two different versions of the events that took place on July 8 and July 9, 2013. The Employer's version of events was that, in response to the news that hours were to be temporarily cut, Claimant behaved in a completely unprofessional and unacceptable way. The Claimant's version was that she was upset, but did nothing to transgress the boundaries of workplace decorum.

Crediting the Employer's version, as was within his authority to do, Referee Palangio found her behavior was sufficient to rend their employer-employee relationship. The testimony of the Employer's witnesses certainly supported this finding — especially as to raised voices and finger pointing in the office and further behavior within the view and hearing of other employees.[4]

I may note that the Board of Review concurred in his conclusion.

Pursuant to the applicable standard of review described supra at 6-7,

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[4] However, I pause to note my own view that an employee's threat of legal action is of limited probative value on the question of misconduct. If an employee has legal remedies available, he or she has a right to exercise them, and, if done civilly, a right to threaten them.

the decision of the Board of Review 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. 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 her work — i.e., unprofessional behavior in the workplace — is well-supported by the record and should not be overturned by this Court.

C

Repayment of Benefits Received

Referee Palangio also upheld that part of the Director's Decision which ordered Ms. Palomar to repay the $897.00 she had received in benefits. The Director had acted pursuant to Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was

> disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.
> * * *
> (b) There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

When reviewing the Director's order, the Referee found that:

> When filing for benefits, the claimant informed the Department of Labor that she was laid off due to a lack of work. She was terminated. I find, under the circumstances, that she was overpaid benefits for those weeks and at fault for her not reporting properly, and, therefore, determine that it would not defeat the purposes for which the Employment Security Act was designed to require her to repay those benefits as previously determined by the Director under Section 28-42-68 of the Act.

Referee's Decision, October 29, 2013, at 3-4. Accordingly, the Referee upheld the Director's order of repayment. But for the reasons that follow, while I believe this Order — upheld by the Board of Review — must be generally affirmed, I will recommend a slight modification.

In this the Claimant testified that she first applied for benefits because her hours were cut (a partial benefit claim). Then, she was fired. I find this sequence completely plausible.

I can therefore see how the initial claim could have been, without deceit, filed as a lack-of-work claim. But, this error should have been corrected in a reasonable time after her status had changed. Accordingly, I recommend that as to her first week of benefits the order of repayment be vacated.[5]

VI
CONCLUSION

Upon careful review of the evidence, I find that the decision of the Board of Review is not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it is also 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 except that the Order of repayment be modified.

/s/
Joseph P. Ippolito
Magistrate

July 11, 2014

[5] As it happens, Ms. Palomar only received benefits for three weeks. She apparently found a new position very quickly, which is commendable.