STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Jeffrey Wishik, M.D.	:	
	:	
v.	:	**A.A. No. 13 - 057**
	:	
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, 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 Honorable Court at Providence on this 25th day of November, 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. Last year, in Davidson v. Department of Labor and Training Board of Review,[1] this Court heard an appeal filed by Ms. Sally Davidson, a nurse practitioner, from a decision of the Department of Labor and Training Board of Review finding her to be disqualified from receiving unemployment benefits because she had left her prior employment — at the medical office of Dr. Jeffrey Wishik — without good cause.[2] This Court sustained Ms. Davidson's appeal and vacated the Board's decision because it found that the

[1] A.A. No. 12-182 (Dist.Ct. 10/25/2012).

[2] See Gen. Laws 1956 § 28-44-17.

evidence of record did not support a finding that Ms. Davidson had quit.[3] And because of testimony describing what might plausibly be determined to be misconduct on the part of Ms. Davidson, the Court remanded the matter so that the Board could consider whether she had been fired for proved misconduct, which, if true, would disqualify her from receiving benefits.[4]

The Board of Review has fulfilled the mandates of this Court's order, in the first instance by referring the case to one of its referees for a hearing on the misconduct issue. And after the designated Referee, Mr. John Costigan, decided that misconduct had not been proven by the employer, and allowed benefits, the Board affirmed his decision. Consequently, Dr. Wishik appeals to this Court in an effort to overturn this ruling.

Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by a provision of the

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[3] The Board of Review found that Claimant Davidson was disqualified because she had quit — but not for good cause. On appeal, this Court held that — to the contrary — the evidence of record showed conclusively that Claimant had not quit but had been fired. Davidson, supra n. 1, slip op. at 11-14. However, we also opined (in what must be viewed as dicta) that Ms. Davidson did not have good cause to quit. Davidson, slip op. at 10.

[4] See Gen. Laws 1956 § 28-44-18.

Employment Security Act[5] and the procedure that we follow in hearing such cases is that prescribed in the Rhode Island Administrative Procedures Act.[6] Finally, I note that this matter has been referred to me as District Court magistrate for the making of findings and recommendations.[7]

For the reasons stated below, I conclude that the decision issued by the Board of Review granting benefits to Ms. Davidson is not clearly erroneous in light of the evidence of record and the applicable law; I therefore recommend that it be AFFIRMED.

I

Facts and Travel of the Case

The travel of the first half of this case is stated in the opinion published on October 25, 2012. The second half began on December 10, 2012, when Referee Costigan conducted a further hearing in this case focusing on the issue specified in our remand — i.e., whether Claimant was discharged for proved misconduct. Ms. Davidson appeared with counsel; Dr. Wishik and his wife, who is the office manager, were also in attendance. In his decision, issued on

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[5] See Gen. Laws 1956 § 28-44-52.

[6] See Gen. Laws 1956 § 42-35-15(g).

[7] See Gen. Laws 1956 § 8-8-8.1.

December 20, 2012, the Referee made the following Findings of Fact regarding claimant's separation:

> **2. FINDINGS OF FACT:**
>
> The claimant had worked for the employer as a Nurse Practitioner for ten years. Her last day of work was January 26, 2012. The employer and claimant had met on January 16, 2012 to discuss goals, objectives and expectations for the claimant's position. At that meeting the claimant notified the employer that she was looking into a new opportunity with another employer. The claimant did not have a firm job commitment and did not have a defined date that she might be leaving her job but informed the employer that she planned to continue working for them and would provide training during the transition for her replacement. The employer said they were happy for the claimant and at that point did not continue the review and agreed to meet at a later date. On January 26, 2012 they met again and the employer addressed the goals, objectives and expectations from the previous meeting. The employer said the claimant's attitude was negative and she objected to the issues being reviewed. The discussion became heated and led to the employer telling the claimant she had to leave right now. The claimant concurred that it was a contentious meeting. She felt unappreciated by the employer and that the employer did tell her she had to leave and was told to turn in her keys. She interpreted that to mean that she was being let go. She retrieved items from her desk, turned in the key and left the worksite.

Referee's Decision, December 20, 2012, at 1-2. Based on these findings — and after quoting extensively from Gen. Laws 1956 § 28-44-18 — the Referee formed the following conclusions on the issue of Claimant's conduct:

> **3. CONCLUSION:**
> * * *
> The burden of proof in establishing misconduct in connection with the work on the part of the claimant rests solely with the employer. Based on the testimony presented in this case I find the employer has not met this burden. The employer dismissed the claimant as a result of the contentious discussion at a review meeting. Both parties indicated disagreement at the meeting which led to the claimant being told to leave and turn in her key, which was her termination from the job. While it seems both parties may have acted hastily in the matter, I do not find any actions by the claimant that would indicate misconduct in connection with the work as defined in the above referenced Act and as a result benefits cannot be denied in this matter.

Referee's Decision, December 20, 2012, at 2-3. Thus, Referee Costigan found Claimant Davidson not to be disqualified from receiving benefits because of proved misconduct.

The employer filed an appeal and the matter was reviewed on its merits by the Board of Review. On March 15, 2013, 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 decision of the Referee was affirmed. Finally, on March 29, 2013, the employer — Dr. Wishik — filed a 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." Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004). 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 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. Foster-Glocester Regional School Committee, 854 A.2d at 1018.

III

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 decision of the agency unless its findings are 'clearly erroneous.' "[8] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[9] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[10]

The Supreme Court of Rhode Island directed in Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 200, 200 A.2d

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[8] 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).

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

[10] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Board of Review of the Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

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 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 Davidson properly deemed eligible to receive unemployment benefits because she was discharged from her position in the absence of proved misconduct pursuant to § 28-44-17?

V

Analysis

As stated above, the Board of Review — relying on the decision of the Referee — found that Claimant was not discharged for proved misconduct. In order to evaluate the propriety of this finding, we shall begin with a review of the testimony elicited at the hearing held on December 10, 2012.

A

Misconduct — The Factual Record.

The first witness to testify at the hearing conducted by Referee Costigan was Dr. Wishik, who endeavored to prove that Ms. Davidson had committed misconduct while in his employ. Referee Hearing Transcript, at 12 et seq.

Dr. Wishik began by enumerating several disputes which he had had with Ms. Davidson. One concerned a vacation week she had taken at the end of December, 2011. Referee Hearing Transcript, at 12. A second centered on her 2011 request for a raise — which she believed was deserved in light of what other nurse practitioners were making, and which he denied because he concluded she did not meet the norms of productivity of the average nurse practitioner. Referee Hearing Transcript, at 12-18.

It was apparently at this time that the doctor informed Claimant of the amount of the payments he received from insurance companies for the office visits she conducted. Referee Hearing Transcript, at 28. Later, in November of 2011, he gave her data showing she was not meeting targets. Referee Hearing Transcript, at 31. Based on this data, he decided to implement a change in the style of his practice — he would end Claimant's long sessions with her patients, and refer patients who needed counseling to other offices. Referee Hearing Transcript, at 29-34.

With this background implanted, Dr. Wishik told Referee Costigan that a meeting in the nature of a performance review that he had scheduled with Ms. Davidson for January 16, 2012 was postponed to January 26, 2012, when she told him she would be "transitioning" to a new position. Referee Hearing Transcript, at 23. Nevertheless, on January 26th the meeting did indeed go forward, eventfully but not amicably.

According to Dr. Wishik, Ms. Davidson expressed the opinion that the performance review was "ridiculous" and "petty." Referee Hearing Transcript, at 23. She then stated her opposition to a number of changes the Doctor intended to institute, including the modification of her appointments described above. Referee Hearing Transcript, at 24-26. Finally, she told the doctor that he

and his wife had "their heads up their asses." Referee Hearing Transcript, at 26. As a result, she was told "she could leave now." Referee Hearing Transcript, at 26, 37.[11]

On cross-examination, the doctor related that — before this incident — he and Claimant had never really had any significant disagreements during her years in his practice. Referee Hearing Transcript, at 39-40. He found no fault with the manner in which she saw patients. Referee Hearing Transcript, at 44. Regarding the final incident, he stated that both Claimant and Mrs. Wishik raised their voices. Referee Hearing Transcript, at 42.

Mrs. Wishik also testified. See Referee Hearing Transcript, at 49 et seq. She shed further light on the meetings the doctor had with Ms. Davidson. She described the first, on the sixteenth of January, as being very friendly. See Referee Hearing Transcript, at 50. Ms. Davidson said that she was burnt out. Id. Doctor Wishik commiserated with her, acknowledging that ADD patients were "difficult." Id.

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[11] At the second hearing, the doctor reiterated his belief that Claimant had already quit, and that they were merely negotiating the conditions under which she could continue to work while "transitioning." Referee Hearing Transcript, at 27. In my previous opinion, I explained why I believe this belief is not legally defensible. Nevertheless, the doctor has every right to persist in his subjective belief of what occurred.

But, at the next meeting, on the 26th, Ms. Davidson expressed a different attitude. She questioned the validity of a testing machine the doctor had purchased. Referee Hearing Transcript, at 52. She was unhappy and would not change anything in the performance review. Referee Hearing Transcript, at 51. Then, when Mrs. Wishik said —

"[W]e didn't understand that you felt that way, Sally."

Mrs. Davidson responded —

"[T]hen, you must have your heads up your asses."

Referee Hearing Transcript, at 52. At this point, Mrs. Wishik told Claimant that she should leave. Id.

Finally, Ms. Davidson testified. See Referee Hearing Transcript, at 55 et seq. She indicated that, as of January 26, 2012, she did not have another job, although she was looking. Referee Hearing Transcript, at 55-56. She admitted that she did indeed employ the vulgar phrase which she was accused of using. But she testified she said it to Mrs. Wishik (not the doctor) in reference to the performance review process used in the office; to be precise, she admitted saying — "You have your head up your ass if you think you've met my expectations of performance reviews." Referee Hearing Transcript, at 59. According to Claimant, Mrs. Wishik (not the doctor) then said — "You can

leave now." Referee Hearing Transcript, at 59, 61. And, it was she who asked for Claimant's key. Id.

B

Misconduct — Sufficiency of the Evidence.

In my earlier opinion, I found that Claimant did not quit her position at Dr. Wishik's medical office. See Davidson, supra n. 1, slip op. at 10-14. But I did not simply recommend that the Board of Review's decision be reversed. Instead, I also recommended that the matter be remanded to the Board for consideration of a second question — whether Claimant's behavior merited her being disqualified for misconduct, as provided in Gen. Laws 1956 § 28-44-18. Although this recommendation was primarily prompted by the vulgarity Claimant uttered on the day she was discharged (which prompted her dismissal), I did not seek to limit the remand-hearing to that single issue.

After the remand, the Board of Review fully complied with this Court's order, referring the matter to Referee Costigan, who held a hearing which provided Dr. Wishik with an ample opportunity to proffer evidence of misconduct. But the Referee found Dr. Wishik did not present sufficient evidence to satisfy his burden of proof. And so, since Ms. Davidson essentially admitted to making the utterance, we must infer that Referee Costigan did not

find Ms. Davidson's language constituted misconduct, even though he did not specifically cite it or quote it in his decision (perhaps out of a sense of propriety or discretion).

In my view, Referee Costigan could well have found, completely reasonably, that Ms. Davidson's use of this language constituted misconduct. The use of insulting or vulgar language in the workplace, especially when the comment was made to one's employer or supervisor, has long been held sufficient to trigger a section 18 disqualification. See Kirby v. Department of Employment Security Board of Review, A.A. No. 82-429, (Dist.Ct. 03/16/1984)(Beretta, J.)(Claimant's disqualification affirmed where he called his supervisor a vulgar and profane name without adequate provocation); Marchand v. Department of Employment Security Board of Review, A.A. No. 78-207 (Dist.Ct. 06/13/1980)(McOsker, J.)(Denial of benefits affirmed in light of a vulgar comment made to supervisor). See also Palumbo v. Department of Employment and Training Board of Review, A.A. No. 91-98, (Dist.Ct. 10/21/1991)(DeRobbio, C.J.).

But there are precedents to the contrary, allowing benefits. See Department of Employment Security v. Brown, A.A. No. 83-269, (Dist.Ct. 07/26/1985)(Higgins, J.)(Board allowed benefits to DES employee and the

Department appealed; Affirmed, where criticism of supervisor was found to be precipitated by emotional strain); McCarthy v. Department of Employment and Training Board of Review, A.A. No. 95-04, (Dist.Ct. 04/19/1995)(Beretta, J.)(Claimant, during meeting with physician/employer called physician's wife — the office manager — a liar; denial of benefits reversed). The Referee and the Board of Review each chose this latter path in this case.

And this Court is not empowered to determine, de novo, whether to allow benefits. Instead, we are limited to a narrower question: Did Ms. Davidson's conduct, as described in the certified record, require a finding of misconduct? I believe the answer to this question must be no.

As the ultimate administrative fact-finder, the Board of Review (by incorporating the Referee's decision as its own) was within its authority to view her behavior in the light of the fact that she had been employed by the practice for ten years, serving in a professional capacity[12] in a manner which was, as the employer stated, professional and not contentious, despite the fact that they disagreed on the best way in which to treat their patients. The Board could also

[12] The authority and functions of a nurse practitioner were not explained in this record. Nevertheless, we note that, pursuant to Gen. Laws 1956 § 5-34-3(4) nurse practitioners have prescriptive powers and may be recognized as a primary care provider. See also Gen. Laws 1956 §§ 5-34-37 and 5-34-38.

rely on the fact that the comment was said outside the hearing of staff and patients. Referee Hearing Transcript, at 41. Her conduct on her last day of work could therefore be viewed as an isolated act of poor judgment, completely inconsistent with her normal office demeanor.

Moreover, the Referee and the Board of Review could well have credited Claimant's version of events — specifically, her testimony that she made the comment in question to Mrs. Wishik, not the doctor, who was in fact her employer.

For these reasons, the Referee and the Board of Review could find that Ms. Davidson's behavior on her last day of work was an isolated act of poor judgment, not evincing a willful disregard for her employer's interests.

C

Resolution of the Misconduct Issue

Pursuant to § 42-35-15(g), 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. When applying this standard, the Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact, including the question of

which witnesses to believe.[13] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[14] Accordingly, I must conclude that the Board of Review's finding — that the Claimant had not been terminated for proved misconduct — is not clearly erroneous in light of the reliable, probative, and substantial evidence of record. As a result, I must recommend that the decision of the Board be affirmed.

VI

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, the instant decision was not 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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[13] Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968).

[14] Cahoone, supra n. 13, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra at 7-8 and Guarino, supra at 8, n. 8.

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

/s/
Joseph P. Ippolito
MAGISTRATE

November 25, 2013