STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Michelle D. Lentini	:	
	:	
v.	:	**A.A. No. 13 - 062**
	:	
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 REVERSED.

Entered as an Order of this Court on this 12th 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. Ms. Michelle D. Lentini 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. 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. Employing the standard of review applicable to administrative appeals, I find that the

decision of the Board of Review is not supported by substantial evidence of record and was affected by error of law; accordingly, I recommend that it be reversed.

I

FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Michelle D. Lentini was employed by Memorial Hospital for twenty-five years as a unit secretary until she was terminated on November 26, 2012 for repeated instances of tardiness. She applied for employment security benefits but on December 28, 2012 the Director of the Department of Labor and Training decided 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 Carol A. Gibson on January 29, 2013 at which the Claimant and several employer representatives appeared and testified. In her January 30, 2013 Decision, Referee Gibson found the following facts regarding the Claimant's termination:

> **2. Findings Of Fact:**
>
> The claimant had worked for the employer, a hospital for twenty five years and was last employed as a unit secretary through November 26, 2012. It was indicated that during the final period the claimant was employed she had received disciplinary action due to tardiness. The claimant received a verbal counseling on February 8, 2012, a written warning on March 6, 2012 and a final written warning on April 26, 2012.

> The warnings indicated the claimant would be subject to termination if further offenses occurred. The claimant was then out on medical leave from May 6, 2012 through August 25, 2012. The employer indicates when the claimant returned to work she had twenty-one tardy occurrences of her thirty eight shifts. The claimant indicates that most of these dates she was only a few minutes late due to issues with the hospital shuttle not picking up employees timely from the employee parking lot. The employer testified that they did not immediately terminate the claimant due to the tenure of her employment and as they were trying to work with her. The employer indicates they offered the claimant to change her shift or reduced her hours but she declined. The claimant was then thirty-five minutes late on November 18, 2012, as she locked her keys in her car and she was fifty-five minutes late on November 22, 2012, as she overslept. The claimant was terminated in accordance with the final warning regarding her tardiness.

Decision of Referee, January 30, 2013 at 1. Based on these findings, the Referee pronounced the following conclusions:

> **3. Conclusion:**
> * * *
> In all cases of discharge, the burden of proof to show misconduct in connection with the work on the part of the claimant rests solely with the employer. In the case, the claimant was terminated for the reasons as cited in the Findings of Fact, primarily tardiness which continued after verbal and written warnings, and included a final warning which indicated continued tardiness would result in her termination. I find the employer has demonstrated that the claimant's actions led directly to her separation and as such constitute misconduct rising to the level as defined above. Therefore, the claimant cannot be allowed benefits in this matter.

Decision of Referee, January 30, 2013 at 2. Accordingly, the Referee found Claimant was disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-18. Id.

Thereafter, a timely appeal was filed by Ms. Lentini and the matter was reviewed

by the Board of Review. In a decision dated March 8, 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 Board determined that claimant was disqualified from receiving unemployment benefits; the Decision of the Referee was thereby affirmed.

Ms. Lentini filed an appeal within the Sixth Division District Court on March 4, 2013. On June 19, 2013, the undersigned conducted a conference at which a briefing schedule was set. The Claimant's Memorandum was received; then, on October 21, 2013, the Board of Review notified this Court that it had decided not to submit a memorandum in this case. Accordingly, I have proceeded to submit these findings and recommendation without further delay.

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 his 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:

> * * * 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

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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).

3 Id.

> 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

Memorial Hospital terminated Ms. Lentini due to repeated instances of lateness. Of course, the hospital's right to take this action is not an issue in this case. The only issue is whether she must be disqualified from receiving unemployment benefits.

For the following reasons I conclude that the Board of Review's decision in this case is clearly erroneous. I do so because I do not believe the record supports a finding

of "misconduct" as that term is defined in section 18 and the Turner case. I do not find in the record evidence that Claimant was late deliberately, or carelessly, or because she disregarded her duty to the hospital to appear at work on-time. Instead, I believe that the record shows that her pattern of minor lateness was attributable to parking issues and that the two instances of major lateness in her last week of work arose from such different causes as to make a finding of willfulness impossible.

And so, after explaining my reasoning in greater detail, I shall recommend that the Board's decision denying benefits be reversed.

A

Summary of Testimony

The first witness for the employer was Ms. Elaine Joyal, Memorial Hospital's Patient Care Director. Referee Hearing Transcript, at 14 et seq. She began by testifying that Ms. Lentini, who ended her twenty-five year career at the hospital as the full-time unit secretary in the Wood 6 Unit, was terminated in November of 2012 for tardiness. Referee Hearing Transcript, at 15-16. Ms. Joyal told Referee Gibson that Ms. Lentini, who had been out on medical leave (due to blood pressure issues) during the period from May 6, 2012 through August 25, 2012, had a history of tardiness. Referee Hearing Transcript, at 17, 31, 33.

As a result of her pattern of lateness,[4] Ms. Lentini had been given warnings,[5] including a "final" warning[6] — which included the threat of termination. Referee Hearing Transcript, at 22, 26-27, 35. In fact, since she came back from her medical leave, she was late on 21 of 38 work-days. Referee Hearing Transcript, at 19, 32-33, 36. According to Ms. Joyal, she was not fired because of these many absences because the hospital was trying to "help" Claimant. Referee Hearing Transcript, at 37-38.

Nonetheless, she was fired for two specific instances of lateness: one where she had been thirty-five minutes late (on November 18, 2012); the other where she had been fifty-five minutes late (on November 22, 2012, which was Thanksgiving Day). Referee Hearing Transcript, at 18, 25. The hospital's managers felt they were part of a pattern of behavior that was not changing. Referee Hearing Transcript, at 30-31.

The next witness was Ms. Michelle Mallon, the Nurse Manager of the Wood 6 Unit. Referee Hearing Transcript, at 39 et seq. She remembered that on one occasion Claimant was late due to problems with her car. Referee Hearing Transcript, at 43. Ms. Mallon said she believed Ms. Lentini's earlier tardiness was a factor in her termination.

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[4] The Claimant was also warned about unscheduled absences, but this conduct was apparently not a reason for discharge. Referee Hearing Transcript, at 28.

[5] On February 8, 2012 and March 6, 2012. Referee Hearing Transcript, at 26.

[6] On April 26, 2012. Referee Hearing Transcript, at 26.

Referee Hearing Transcript, at 44. More generally, she testified that the hospital's policy on tardiness was enforced uniformly. Referee Hearing Transcript, at 43.

Memorial Hospital's final witness was Lisa Pratt, its Vice-President of Human Resources. Referee Hearing Transcript, at 46 et seq. She explained that her function in this matter was to insure that the proper process was followed. Referee Hearing Transcript, at 47. She insisted the hospital was trying to "work with" a long-term employee, while maintaining the necessity of employees being on-time in a hospital setting. Referee Hearing Transcript, at 51-52. At the close of her cross-examination by Claimant's counsel, she indicated that there can be more than one "final warning." Referee Hearing Transcript, at 56.

The final witness was Claimant Lentini. Referee Hearing Transcript, at 56 et seq. She began her testimony by stating that, at the time of her termination, she was a full-time unit secretary on Wood 6. Referee Hearing Transcript, at 57. She explained that when arriving for work she would park "a mile away" and take the shuttle, as required by the hospital. Referee Hearing Transcript, at 57-58. She described the inadequacy of the shuttle system, and stated that it made her a little bit late on many occasions. Referee Hearing Transcript, at 59-60.

Ms. Lentini indicated that her medical leave was the result of stress causing her to have "extremely high blood pressure" or hypertension. Referee Hearing Transcript,

at 60. She described how this medical issue came to a head: One day at work the nurses thought she looked ill; so, they took her blood pressure and it was "really, really high." Referee Hearing Transcript, at 60-61. She went to the emergency room and was admitted. Referee Hearing Transcript, at 61. In fact, she was hospitalized on the floor where she worked. Referee Hearing Transcript, at 60-61.

And, after the incident, she was brought in for a "final" warning, which increased her anxiety level. Referee Hearing Transcript, at 62.

She attributed a large majority of her instances of tardiness to inadequacies in the hospital's parking shuttle system. Referee Hearing Transcript, at 64-65. She indicated she brought this up at her counseling sessions. Id. She indicated her November 18, 2012 instance of tardiness (of 35 minutes) occurred because her keys had been locked in her car. Referee Hearing Transcript, at 66. She overslept on Thanksgiving (November 22, 2012) which resulted in her being 55 minutes late. Referee Hearing Transcript, at 66-67.

Finally, she informed the Referee that hospital employees had a seven-minute grace period before they were considered late. Referee Hearing Transcript, at 71.

B

Reasoning

It is clear from a reading of the transcript that the hospital did not terminate Ms. Lentini because of her many instances of minor lateness. According to Claimant, she was late on these occasions due to the inadequacy of the hospital parking shuttle system. Interestingly, her testimony on this point was not challenged by any of the three hospital representatives present at the hearing. Moreover, it is not clear that these instances of minor lateness should even be considered venial sins, since it is not clear from the record how many resulted in Ms. Lentini being tardy for longer than the hospital's seven-minute grace period.

And so, we arrive at the heart of the matter — the two instances of major lateness which instigated the hospital's termination of Ms. Lentini. I simply do not believe these two incidents were sufficient to constitute a willful or wanton pattern of lateness. On the first occasion, she locked her keys in the car; this is a misfortune which can befall anyone; certainly not a misadventure that one takes blithely, but one that is entered into unthinkingly or absentmindedly.

And we must but assume that the second incident of major lateness — 55 minutes on Thanksgiving Day — must have caused some consternation at the hospital among the employees who were there working on the holiday. One can speculate,

perhaps reasonably, that at this juncture the hospital's hand might have been forced to take action to ameliorate the situation; but the employer's need to fire an employee does not require, per se, a disqualification. Ms. Lentini, according to her unrebutted testimony, was a very sick woman, who had been in the recent past, hospitalized in the employer's own facility. In these circumstances I cannot find that one instance of oversleeping was sufficient to meet the standard established in § 28-44-18 and clarified in Turner. And so, I cannot find that the Board of Review's determination of misconduct is supported by the evidence of record.

VI

CONCLUSION

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 7 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. Nevertheless, for the reasons stated above, especially my personal review of the record, particularly the testimony given at the hearing before the Referee — summarized above — I believe the Board's

decision is clearly erroneous in view of the reliable, probative and substantial evidence. Gen. Laws 1956 § 42-35-15(g)(5).

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

/s/
Joseph P. Ippolito
MAGISTRATE

November 12, 2013