STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Allison Fonseca	:	
	:	
v.	:	**A.A. No. 13 - 093**
	:	
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 and 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 Board of Review's decision denying benefits to Ms. Fonseca is hereby AFFIRMED.

Entered as an Order of this Court at Providence on this 27th 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. In this administrative appeal Ms. Allison Fonseca urges that the Board of Review of the Department of Labor and Training erred in denying her claim for unemployment benefits. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to 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 clearly erroneous in light of the reliable, probative and 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 AND TRAVEL OF THE CASE

Ms. Fonseca was employed for six and one-half years at Roger Williams Hospital as an administrative assistant. Her last day of work was January 7, 2013. She filed a claim for employment security benefits on January 14, 2013 but a designee of the Director of the Department of Labor and Training denied the claim in a decision dated February 20, 2013 — based on a finding that claimant had been discharged for disqualifying reasons under Section 28-44-18 of the Employment Security Act. See Director's Decision, at 1 (Department's Exhibit 2). The Claimant filed a timely appeal to the Board of Review and the matter was assigned to Referee Gunter A. Vukic for hearing.

On March 19, 2013 a hearing was held at which the Claimant and two employer representatives appeared and testified. Referee Hearing Transcript, at 1. Counsel appeared for both the Claimant and the employer. Id. In his decision dated March 25, 2013 the Referee made the following findings of fact:

> The claimant was a Roger Williams Hospital Cancer Center administrative assistant for more than six years. In her capacity she had authority to view patient medical records of the center. Following a complaint from a different medical provider that their patient medical records were compromised the employer

> investigated and found the claimant repeatedly accessed her boyfriend's medical records between December 3, 2012 and January 4, 2013. The boyfriend was a hospital patient and unsure whether he'll authorize the claimant to view his medical records. During this same time the claimant repeatedly viewed the records of the boyfriend's girlfriend. The girlfriend was not a Roger Williams Hospital or Cancer Center patient. Claimant printed the girlfriend's microbiology report.
>
> Claimant was discharged after her unauthorized medical record access.

Referee's Decision, at 1. Based on these findings, the Referee formed the following conclusions:

> **CONCLUSION:**
> * * *
> 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. It must be found and determined that the employer has met their burden.
>
> The claimant was trained and familiar with the HIPAA confidentiality provisions. Claimant had previous experience working with medical records. The employer has the right to expect the trustworthiness and credibility of the employees charged with the patient medical record use.
>
> In this case, the boyfriend, father of the claimant's child and father of the child of the woman whose records the claimant repeatedly reviewed during the same time period, apparently was a patient of the employer and was unsure if he gave the claimant permission to view his records.
>
> The medical provider of the girlfriend initiated a complaint that their patient's records had improperly been accessed. Credible testimony and credible evidence supports that the claimant

> repeatedly viewed these records. Claimant testifies that she was unaware of who this woman was and her relationship to the claimant's boyfriend yet was unable to provide any credible reason to support the simultaneous viewing of medical records of an individual with no connection to Roger Williams Hospital. Her claim that such a viewing of medical records unrelated to anyone related to the hospital is routine supports the employer's loss of trust in the claimant and the resulting discharge for her medical record unauthorized viewing.

Referee's Decision, at 2. Thus, the Referee determined that the Claimant was discharged for disqualifying misconduct under § 28-44-18 of the Rhode Island Employment Security Act. Referee's Decision, at 2. Accordingly, Referee Vukic affirmed the decision of the Director. Referee's Decision, at 3.

Claimant filed an appeal and on May 10, 2013 the Board of Review affirmed the Referee's decision, finding it to be a proper adjudication of the facts and the law applicable thereto. Board of Review Decision, at 1. Claimant filed a complaint for judicial review in the Sixth Division District Court on May 23, 2013. A conference was conducted by the undersigned on July 24, 2013, at which a briefing schedule was set. Helpful memoranda have been received from the Claimant and the Employer.

II

APPLICABLE LAW

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. Section 28-44-18.

In Turner v. Department of Employment and Training, Board of Review (1984), the Rhode Island Supreme Court expanded upon and clarified the statutory definition, 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."

See 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, supra, 854 A.2d at 1018.

III

STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under § 28-44-52. The standard of review is provided by G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> The court shall not substitute its judgment for that of the agency as to 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 constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon lawful 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.

The scope of judicial review by this Court is limited by Gen. Laws 1956 § 28-44-54, which in pertinent part provides:

> The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules shall be conclusive.

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. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (citing § 42-35-15(g)(5)). The Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215

(1968). "Rather, the court must confine itself to review of the record to determine whether 'legally competent evidence' exists to support the agency decision." Baker v. Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d at 363.

IV
ANALYSIS

In cases of misconduct, the employer bears the burden of proving that the claimant engaged in conduct that evinces "such willful and wanton disregard of an employer's interest as is found in deliberate violations 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." Turner, supra, 479 A.2d at 741-42. At this juncture I shall summarize the evidence and testimony received at the hearing conducted by Referee Vukic.

A

Testimony Received

1

The Employer's Witnesses

The first witness presented by Roger Williams in support of its burden of proof was Ms. Joyce Hackley, Director of Risk Management. Referee Hearing Transcript, at 6, 10 et seq. She indicated that the employer's inquiry into this matter was prompted by a January 7, 2013 telephone call made by someone at the University Medical Group to the hospital's human resources department, informing them that a person named "Tina"[1] had complained that a Cancer Center employee named Allison had posted confidential health care information on Facebook.[2] Referee Hearing Transcript, at 11, 14, 30. This complaint was referred to Ms. Hackley's department — Risk Management.

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[1] In order to protect the confidentiality of patient medical information, the Referee decided to redact the last names from the patient records submitted into evidence. Referee Hearing Transcript, at 9. Likewise, the patients were referenced only by their first names during testimony. Referee Hearing Transcript, at 11. Since the record is so fashioned, we are required to follow suit. We intend no disrespect to these persons.

[2] It later turned out no Facebook allegation had been made; Tina's complaint had apparently been miscommunicated within the hospital. Referee Hearing Transcript, at 33-34.

Ms. Hackley followed up on this complaint by telephoning Tina on January 8, 2013. Referee Hearing Transcript, at 14. Later that same day, Tina came into the Medical Center accompanied by a man named Roberto, with whom she has a child in common. Referee Hearing Transcript, at 13-15. Ms. Fonseca also has a child in common with this same Roberto. Referee Hearing Transcript, at 13.

Tina believed Ms. Fonseca was the person who accessed her information because of a text message dated January 5, 2013 at 3:11 p.m. that Roberto received from Claimant that included Tina's license photo;[3] however, the text message did not include any patient health information. Referee Hearing Transcript, at 15, 17-18, 31-33. Ms. Hackley was shown the text message by Roberto. Referee Hearing Transcript, at 18.

In any event, Tina was upset by this apparent invasion of her privacy. Referee Hearing Transcript, at 16. It was noted that Tina's file did not contain a release granting Allison permission to access her medical records. Referee Hearing Transcript, at 24.

And for his part, Roberto, who was also never a patient of the Cancer Center, did not recall giving Allison permission to access his patient

[3] Roger Williams does routinely photocopy its patients' licenses. Referee Hearing Transcript, at 18.

information. Referee Hearing Transcript, at 19, 29, 52. His records too were put into evidence. Referee Hearing Transcript, at 25.

For background purposes, Ms. Hackley explained that the hospital's information system is called Meditech. Referee Hearing Transcript, at 20. Employees must access Meditech by entering their passwords. Id. Meditech enables the hospital to determine which employees have accessed each patient's medical record. Referee Hearing Transcript, at 20-21, 39-40. Miss Hackley explained that Ms. Fonseca did, as part of her duties, have the ability to access patient records. Referee Hearing Transcript, at 38.

Regarding the instant case, she presented an audit log of Tina's records, showing that Ms. Fonseca accessed them on four dates and once printed a document, a microbiology report — even though Tina was a patient at the Medical Center and Allison worked at the Cancer Center, where Tina was not a patient. Referee Hearing Transcript, at 20-23. And Miss Hackley explained that the codes on the log meant that Claimant accessed Tina's medical records — which consist of scanned documents, reports and the like. Referee Hearing Transcript, at 48.

With this information in hand, we shall now resume the timeline of events. On the same day she had met with Tina and Roberto, January 8th, Ms. Hackley and her colleagues also met with Ms. Fonseca. Referee Hearing

Transcript, at 15. She denied obtaining any information about Tina, or even knowing her at the time. Referee Hearing Transcript, at 16, 41. She told them that she accessed Roberto's records — at his request — in order to get an opinion from a doctor regarding some lab results. Referee Hearing Transcript, at 27-28. However, she said she knew she should not have done it. Referee Hearing Transcript, at 28.

Finally, Ms. Fonseca admitted she sent the text message. Referee Hearing Transcript, at 37.

The employer's second witness was Ms. Chris DaRosa, of the hospital's human resources department, who testified regarding how the hospital disseminates its confidentiality (and HIPAA) policies to the members of its staff. Referee Hearing Transcript, at 54 et seq. She corroborated Ms. Hackley's testimony regarding Ms. Fonseca's denial that she ever accessed Tina's records although she admitted the possibility that Claimant might have denied she could remember accessing the records. Referee Hearing Transcript, at 58.

2

The Claimant's Testimony

Ms. Fonseca testified in support of her claim for benefits. Referee Hearing Transcript, at 63 et seq. She testified that, at the Cancer Center, her job was to assist the patients by answering the phone and getting them their

medical records. Referee Hearing Transcript, at 63. She stated her office was very busy, obtaining patients' medical information for both the patients themselves — mostly — and also their doctors. Referee Hearing Transcript, at 63, 73. She further explained that her computer access extended to the whole hospital, not just the Cancer Center. Referee Hearing Transcript, at 70.

She said that, as of January 8, 2013 (when she was questioned), she did not know who Tina was. Referee Hearing Transcript, at 64, 73.

Her interviewers did not mention Tina's connection with Roberto. Id. But when they asked her if she had an active Facebook account, she denied that she did. Id., at 64-65.

Ms. Fonseca conceded that she might have accessed Tina and Roberto's records — at their request — but she had no specific memory of such a request being made telephonically or in person. Referee Hearing Transcript, at 65, 72-73. She explained that, to do so, all she would need was a name and date of birth. Referee Hearing Transcript, at 66. And she maintained that, under hospital policy, she did not need a HIPAA release to do so. Referee Hearing Transcript, at 66, 68, 71.

However, she could not explain why she had accessed several different screens in Roberto's records, although she did note that, in the hospital's system, you could have more than one screen open at a time. Referee Hearing

Transcript, at 66, 80. And when questioned on cross-examination, she could not explain why she had gone into Roberto's medical records on four separate occasions on December 3, 2012. Referee Hearing Transcript, at 74-75. Similarly, she could not explain why she had accessed Tina's records on the same date, or why she accessed her microbiology report. Referee Hearing Transcript, at 70, 75-77.

Claimant stated that, as of December (2012), she was in a relationship with Roberto, although she suspected he was involved with another woman. Referee Hearing Transcript, at 66-67, 78. But, she denied she looked into Tina's medical records for her own purposes. Referee Hearing Transcript, at 67.

B

Sufficiency of the Evidence

In this case the Claimant argues that the evidence of record was insufficient to support the Referee's finding (adopted by the Board of Review) that she committed misconduct by examining the medical records of two patients. Specifically, she urges that the hospital was required to prove that she accessed these records with an improper intent — and that the hospital failed to do so. See Appellant's Memorandum of Law, at 2. But for the reasons I shall now enumerate, I cannot agree with the Appellant's position.

The Appellee-Employer maintained throughout these proceedings that Claimant was terminated for accessing the medical records of two patients without proper authority, violating both its patient-confidentiality rules and HIPAA.[4] Referee Hearing Transcript, at 29. In support of this allegation it provided log sheets specifying the myriad of incursions she made into the records of Tina and Roberto. See Employer's Exhibit 1 (Tina) and Employer's Exhibit 2 (Roberto). Also in the record is the Hospital's Human Resources Policy — which not only prohibits the improper transmission of patient information but also bars the accessing of such information improperly. See Director's Exhibits D1J and D1K. The employer also provided ample proof of Claimant's familiarity with patient-confidentiality rules. See Director's Exhibits D1M, D1N, D1O, D1P, and D1Q.

In addition, the hospital presented the testimony of two responsible officials of the hospital who provided substantial testimony, albeit hearsay evidence, of (1) the complaint made by Roberto and Tina and (2) the response Ms. Fonseca gave when questioned. The former was properly admitted pursuant to Gen. Laws 1956 § 42-35-18(c)(1), which exempts Board of Review hearings from Gen. Laws 1956 § 42-35-10's mandate that administrative hearings must follow the rules of evidence. The latter testimony was — a

[4] The employer did not allege that the material was disseminated.

fortiori — admissible, since it would be admissible under the rules of evidence as non-hearsay since it is the statement of a party opponent.

Claimant's defense to these allegations — i.e., that she may have accessed these records at the request of the patient — does not hold water. Such an explanation might conceivably have merit regarding Tina's records — but only if her testimony that she did not know who Tina was (at the time) is credited. But that defense simply evaporates regarding her entry into the medical records of Roberto, a man with whom she was in a relationship, and with whom she had a child. The notion that she could have forgotten accessing his records (including four times on one day — December 3, 2012) is just not consistent with human nature.

This position is also undercut by Ms. Fonseca's statement to Ms. Hackley that she went into Roberto's patient records to obtain an opinion from a doctor.[5] Moreover, one would have to believe that it was a mere coincidence that Claimant also accessed Tina's records on the same day — two patients of the Hospital but not of the Cancer Center.

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[5] To carry the point one step further, there was no testimony from Roberto or Ms. Fonseca or Ms. Hackley (regarding her interviews with each of them) describing how Ms. Fonseca reported such an opinion back to Roberto — which allegedly was her purpose in looking into his records.

Additionally, Ms. Fonseca had given this excuse (abandoned at her hearing) in her initial telephone interview with the Department of Labor and Training. See Department's Exhibit D1A (Claimant Statement).

Finally, the Board of Review could give weight to Ms. Hackley's testimony that Claimant admitted sending Roberto the offending text message. While the message did not include any medical information per se, it provided a basis for a reasonable person to infer that Ms. Fonseca had indeed discovered Tina's connection to Roberto, providing her with a potential motive to view her medical records.

V

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to deny claimant Employment Security benefits under § 28-44-18 of the Rhode Island Employment Security Act was supported by reliable, probative, and substantial evidence of record and was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" 42-35-15(g)(4)(5). Accordingly, I recommend that the decision of the Board be AFFIRMED.

/s/
Joseph P. Ippolito
Magistrate

December 27, 2013