**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS**

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

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| **James T. Shorts** | : | |
| | : | |
| **v.** | : | **A.A. No. 15 - 021** |
| | : | |
| **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 REVERSED.

Entered as an Order of this Court at Providence on this 28th day of December, 2015.

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.** Mr. James T. Shorts 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 he 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 clearly erroneous in view of the competent evidence of record; I must therefore recommend that the decision of the Board of Review be REVERSED.

## I

## FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. James T. Shorts worked for Jetro Holdings, LLC for eighteen months, until September 24, 2014, when he was terminated. He filed a claim for unemployment benefits the next day. But, on December 3, 2014, a designee of the Director determined him to be ineligible to receive benefits pursuant to the provisions of Gen. Laws 1956 § 28-44-18, because he was terminated for proved misconduct.

Mr. Shorts filed an appeal and a hearing was conducted by Referee William Enos on January 6, 2015. The next day, the Referee affirmed the Director's decision and held that Mr. Shorts was terminated for proved misconduct. In his written Decision, the Referee made Findings of Fact, which are presented here in their entirety:

> Claimant worked as a packer for Jetro Holdings, LLC for eighteen months last on September 24, 2014. The employer terminated the claimant for violating known safety policies. The employer introduced evidence that showed that the claimant was riding an electric pallet jack in the store among other employees. The employer introduced evidence that showed that the claimant had been trained on all safety policies. The claimant did not deny riding the electric pallet jack in the store stating that the store was closed and nothing was damaged and no one was harmed.

Decision of Referee, January 7, 2015 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:

> * * *
> The claimant was terminated for violating known safety policies. Therefore, I find that the claimant was discharged for disqualifying reasons under Section 28-44-18 of the Rhode Island Employment Security Act.

Decision of Referee, January 16, 2015 at 2. The Claimant appealed and the matter was considered by the Board of Review. On February 23, 2015, a majority of the members of the Board of Review issued a decision in which they found the decision of the Referee to be a proper adjudication of the facts and the law applicable thereto; further, the Referee's decision was adopted as the decision of the Board.

Finally, Mr. Shorts filed a timely complaint for judicial review in the Sixth Division District Court on March 13, 2015.

## 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. —** … For benefit years beginning on or after July 6, 2014, 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 earnings greater than or equal to eight (8) times his or her weekly benefit rate 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. Neubeck, 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.

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

However, in 1998 the legislature broadened the definition of misconduct to include the violation of a uniformly enforced work rule.[1] Now, misconduct may be alternatively defined as "… a knowing violation of a reasonable and uniformly

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

enforced rule or policy of the employer."[2] Thus, proved misconduct may now consist of — (1) traditional misconduct, as defined in Turner, and (2) the intentional violation of a work rule. Proceeding under either theory, the employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law. Foster-Glocester Regional School Committee v. Department of Labor and Training Board of Review, 854 A.2d 1008, 1018 (R.I. 2004).

## 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;

[2] See § 28-44-18. This alternative type of misconduct has three elements — [1] the employee must know of the rule, [2] it must be a reasonable rule, and [3] it must be uniformly enforced.

(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.'"[3] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

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

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3 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)).

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

5 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also, D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I.1986).

> declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

## IV

## ANALYSIS

I must now determine whether the Board of Review's disqualification of Claimant was clearly erroneous in light of the reliable, probative, and substantial evidence of record. But, before doing so, I shall present the facts of record and the positions of the parties.

### A

### The Facts of Record

#### 1

#### Testimony of Mr. David Erickson

The first (and only) witness presented by the Employer at the hearing before the Referee was its Branch Manager, David Erickson, who explained that

Jetro's business was selling food and equipment to owners of restaurants. Referee Hearing Transcript, at 8.

Regarding Claimant's discharge, he stated that Mr. Shorts was seen (on videotape) riding a pallet jack like a skateboard. Referee Hearing Transcript, at 5-6. The company viewed this as a safety violation and Mr. Shorts was discharged for misuse of company equipment. Referee Hearing Transcript, at 6. Mr. Erickson brought the video to the hearing on a disc; he also presented photos taken from the video. The video was marked as Employer's Exhibit No. 3. Referee Hearing Transcript, at 7.

Mr. Erickson explained that the company is very diligent in communicating its safety standards to its employees. Referee Hearing Transcript, at 7. There were quarterly safety meetings and notices in break rooms. Id. Mr. Shorts signed the rules in late 2013. Referee Hearing Transcript, at 8.

On cross-examination, Mr. Erickson said he thought the termination occurred on September 24, 2014, but the incident occurred on September 10th. Referee Hearing Transcript, at 10. He explained the two-week delay resulted from the fact that they had to get the video from their supplier. Id. Mr. Erickson said that they were, at that time, conducting an investigation into a possible theft-ring. Referee Hearing Transcript, at 10-11. He also conceded that at the time of the

incident, 6:52 p.m., the store had been closed since 6:00 p.m. Referee Hearing Transcript, at 12. While he could not identify customers in the area, he could see "cashiers and stuff." Id. When pressed, Mr. Erickson said cashiers would still be at their posts at that time. Id.

Mr. Erickson was then shown a packet of materials that Jetro had submitted, and which had been received into evidence. Referee Hearing Transcript, at 13. But when asked to identify the safety policy that Claimant had violated within these materials, he pointed to a general rule about adhering to safety policies. Referee Hearing Transcript, at 13-14. Mr. Erickson said the decision to terminate Mr. Shorts was made by the Regional Manager, Jason Wiley. Referee Hearing Transcript, at 15.

Mr. Erickson acknowledged that, when Mr. Shorts "rode" the pallet jack, no property was damaged and no persons were injured. Referee Hearing Transcript, at 15. He described the "ride" was about 20-25 seconds long according to the video, but it started out-of-camera range, so it could have been longer. Referee Hearing Transcript, at 17. At the close of his testimony, he reiterated that Jetro has a zero violation policy for safety violations. Referee Hearing Transcript, at 18.

**2**

**Testimony of Claimant Shorts**

Mr. Shorts began his testimony by stating that he worked at Jetro from March of 2013 until September of 2014. Referee Hearing Transcript, at 18. Mr. Shorts said he was terminated by Mr. Jason Wiley for riding a scooter. Referee Hearing Transcript, at 19. But this occurred after he told Mr. Wiley that he knew nothing about any thefts. Id.

Claimant Shorts admitted he rode the pallet jack like a scooter. Referee Hearing Transcript, at 20. But he insisted that [1] it was not a powered machine (but a manual, which had to be "pumped up") and [2] there were no customers in the store (which was closed) when he did it. Referee Hearing Transcript, at 20-21.

Mr. Shorts denied that he had ever been warned about the behavior in the past; he also denied he had ever heard another employee be reprimanded for that type of conduct. Referee Hearing Transcript, at 22.

**B**

**Position of the Parties**

**1**

**Appellant's Position**

In his Memorandum, Claimant Shorts makes two arguments.

First, Mr. Shorts urges that the incident (in which he rode the pallet jack) constituted an isolated instance of poor judgment that should not be deemed disqualifying — particularly since the store was closed and customers were not present. Appellant's Memorandum, at 6.

Second, Claimant argues that the employer's policy of terminating him for a minor safety violation was unreasonable, in that it did not provide for progressive discipline. Appellant's Memorandum, at 6-7.[6] He asserts that his termination was a ruse and that he was really fired because he could not (or would not) provide information regarding suspected thefts. Appellant's Memorandum, at 7.

**2**

**The Board of Review's Position**

In the memorandum it filed in this case, the Board of Review urges that Claimant Shorts was involved in "horseplay" in violation of the employer's "strict" rules regarding safety, which it enforced strictly and vigorously; and which it stressed to its employees regularly. Appellee's Memorandum, at 2. The Board maintained that Claimant's actions constituted an intentional (and contemptuous) violation of one of these rules — and that the circumstances were egregious, since other employees were about. Appellee's Memorandum, at 2-3. Finally, the Board

[6] He notes that any policy against riding pallet jacks was, at best, communicated orally. Appellant's Memorandum, at 7.

argues that the employer should not be discouraged from taking a firm position on safety issues by having its account charged for an employee who failed to adhere to its safety standards.

## C
## Rationale

Whenever an employer opposes a former worker's attempt to obtain unemployment benefits, there are two fundamental questions that must be answered — (1) Was the allegation, if proven, sufficient to constitute misconduct? And, if so, (2) was the allegation, in fact, proven? In this case, the allegation — riding on a piece of warehouse equipment — was proven. It was also admitted. So, we need only determine if the allegation met the section 18–test of sufficiency.

As stated above, the allegation against Mr. Shorts was not of the patently offensive type, but of the newer, alternative variety — "… a knowing violation of a reasonable and uniformly enforced rule or policy of the employer." Gen. Laws 1956 § 28-44-18. We know this because the Referee specifically found that "[t]he claimant was terminated for violating known safety policies." Decision of Referee, January 16, 2015 at 2.

Let us assume that the latter two elements were satisfied — i.e., that the rule at issue in the instant case (which apparently bars "riding" the equipment) is

reasonable and that the rule was uniformly enforced — for it is the first element of this definition of misconduct that I believe is at issue in this case: the element of knowledge. It is clear that when the General Assembly broadened the definition of misconduct to include a violation of a work rule, it set a condition thereto — that before a Claimant may be disqualified from receiving unemployment benefits (due to a violation of an employer's work rule) it must be shown that the employee had been given notice of the rule.

But, in this case, the employer's sole witness, Mr. Erickson, was unable to show that any such rule regarding riding or misusing company equipment had been communicated to Mr. Shorts by any means — not by distribution to him in writing (singly or in a larger compendium of rules), nor by posting on an employee bulletin board (in a lunch room, or elsewhere), and not even by publishing it orally (at a safety meeting or otherwise). And so, we must conclude that the employer failed to satisfy its burden of proving that Mr. Shorts violated a work rule that was known to him.[7]

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[7] While Mr. Erickson stated, repeated, and reiterated that the company was insistent on safety practices generally, he was never able point to a specific rule about misusing equipment. As a result, we have no way to determine whether such a rule actually existed before the incident in question. But, since the employer failed to show Mr. Shorts was given advance notice of any such rule, we need not reach the issue of whether the employer had proved that such a

rule had in fact been promulgated.

## D
## Resolution

Pursuant to Gen. Laws 1956 § 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.[8] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[9]

Applying this standard of review and the definition of misconduct enumerated in Turner, ante, and upon a careful review of the evidence, I must recommend that this Court hold that the Board of Review's finding — that Claimant Shorts violated a known company rule by riding the employer's machinery — was clearly erroneous in light of the reliable, probative, and substantial evidence of record.

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

[9] Cahoone, ante n. 8, 104 R.I. at 506, 246 A.2d at 215 (1968). See also Gen. Laws § 42-35-15(g), ante at 6-7 and Guarino, ante at 7, n.3.

## V
## CONCLUSION

For the reasons stated above, I recommend to the Court that the decision rendered by the Board of Review in this matter be REVERSED.

/s/
Joseph P. Ippolito
Magistrate

December 28, 2015