STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS
PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

Pink Pinapple, LLC	:	
	:	
v.	:	**A.A. No. 10 – 25**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	
(Mary H. Belmore)	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this case the Pink Pineapple, LLC, which operates retail stores in Portsmouth and Newport, urges that the Board of Review of the Department of Labor & Training erred when it held that Ms. Mary H. Belmore, its former employee, was entitled to receive employment security benefits. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by General Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations, pursuant to General Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the decision issued by the Board of Review granting benefits to Ms. Belmore is not clearly erroneous, I recommend it be affirmed.

I. FACTS & TRAVEL OF THE CASE

Ms. Mary Belmore worked for Pink Pineapple, LLC as a retail sales clerk for three years until July 8, 2009. She applied for unemployment benefits but on September 17, 2009, the Director deemed her ineligible because she resigned without good cause within

the meaning of Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and on November 5, 2009 Referee Stanley Tkaczyk held a hearing on the matter.

In his decision, issued on November 9, 2009, the referee found that Ms. Belmore and her manager, Ms. Stacie Hall, had an ongoing dispute regarding the payment of time-and-a-half on Sundays and holidays; he further found that when it was alleged that claimant had shared her views with a co-worker; a telephonic confrontation occurred; as a result, Ms. Hall arranged for another worker to work instead of Ms. Belmore on July 8, 2009, — her next scheduled shift. Decision of Referee, November 9, 2009, at 1.

When Ms. Belmore arrived at work on July 8, 2009, she was told she would be relieved in an hour, which she was; Ms. Belmore alleged that she was terminated on July 8th, but the referee found this testimony unsupported and unpersuasive. Instead, the referee found that claimant voluntarily quit, based on her failure to appear for scheduled shifts subsequent to July 8th. Decision of Referee, November 9, 2009, at 2. Accordingly, she was found disqualified pursuant to section 28-44-17.

Claimant appealed and the matter was the subject of a de novo hearing on December 21, 2009. (N.B. – While the Board normally has the discretion, pursuant to Gen. Laws 1956 § 28-44-47, to issue a decision based on the record before the referee, in the instant matter a new hearing was necessary because the recording of the referee hearing was unavailable). Present at the hearing were: Ms. Hall and her witness, Ms. Kristen Meg (phonetic) and Ms. Belmore, her attorney and her witness, Ms. Debbie Almeida — who testified telephonically.

In its unanimous decision issued on January 13, 2010, the Board of Review made

the following Findings of Fact regarding claimant's termination:

> **2. FINDINGS OF FACT:**
>
> The claimant was employed as a retail sales clerk on the 10:00 am to 2:00 pm shift. Prior to the claimant's last day of work, the claimant and employer were involved in an issue involving the compensation to be paid to the claimant. The issue between the parties escalated during a July 5, 2009, telephone call.
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> On July 9, 2009, the claimant reported to work. She was informed by the employer that because the employer did not know whether the claimant was coming to work, the employer had a replacement coming in at 11:00 am. Because the employer did not need two workers on July 8, 2009, the claimant was sent home. The claimant was not on the schedule after that date, and did not work after that date.

Board of Review Decision, January 13, 2010, at 1. Based on these findings the referee formed the following conclusion on the issue of claimant's separation:

> **3. CONCLUSION:**
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> * * *
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> An individual who leaves work voluntarily must establish good cause for taking that action or else be subject to disqualification under the provisions of Section 28-44-17.
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> The claimant and employer had a dispute or issue over compensation due the claimant for her work on holidays and Sunday. The claimant made her position known to others beside the employer. The employer rightfully took issue with the claimant's publicizing her position. The employer and claimant had heated discussions with the result that the employment relationship became untenable. After the claimant was instructed to leave the premises on July 8, 2009, she was not placed on the schedule. Although the Referee determined that the claimant had quit her job, the credible testimony before the Board established that the claimant was terminated. The employer's actions on July 8, 2009, and the absence of the claimant being on any subsequent schedule, demonstrated that the claimant was terminated. There was no misconduct by the claimant. Therefore the claimant is eligible for benefits under Section 28-44-18 of the Act.

Board of Review Decision, January 13, 2010, at 2. Thus, Board found that (1) claimant had not quit but had been fired and (2) that her firing had not been triggered by proved misconduct; she was therefore found not to be disqualified under § 28-44-17 (Leaving without good cause) or under § 28-44-17 (Misconduct).

Finally, on February 4, 2010, the claimant filed a complaint for judicial review in the Sixth Division District Court.

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 voluntary leaving without good cause; Gen. Laws 1956 § 28-44-17, provides:

> **28-44-17. Voluntary leaving without good cause.** – An individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week until he or she establishes to the satisfaction of the director that he or she has subsequent to that leaving had at least eight (8) weeks of work, and in each of those 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. * * * For the purposes of this section, 'voluntarily leaving work without good cause' shall include voluntarily leaving work with an employer to accompany, join or follow his or her spouse in a new locality in connection with the retirement of his or her spouse, or failure by a temporary employee to contact the temporary help agency upon completion of the most recent work assignment to seek additional work unless good cause is shown for that failure; however, that the temporary help agency gave written notice to the individual that the individual is required to contact the temporary help agency at the completion of the most recent work assignment to seek additional work.

In the case of Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964), the Rhode Island Supreme Court noted that a

liberal reading of good cause would be adopted:

> To view the statutory language as requiring an employee to establish that he terminated his employment under compulsion is to make any voluntary termination thereof work a forfeiture of his eligibility under the act. This, in our opinion, amounts to reading into the statute a provision that the legislature did not contemplate at the time of its enactment.
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> In excluding from eligibility for benefit payments those who voluntarily terminate their employment without good cause, the legislature intended in the public interest to secure the fund from which the payments are made against depletion by payment of benefits to the shirker, the indolent, or the malingerer. However, the same public interest demands of this court an interpretation sufficiently liberal to permit the benefits of the act to be made available to employees who in good faith voluntarily leave their employment because the conditions thereof are such that continued exposure thereto would cause or aggravate nervous reactions or otherwise produce psychological trauma.

Later, in Murphy v. Fascio, 115 R.I. 33, 340 A.2d 137 (1975), the Supreme Court elaborated that:

> The Employment Security Act was intended to protect individuals from the hardships of unemployment the advent of which involves a substantial degree of compulsion.
> Murphy, 115 R.I. at 37, 340 A.2d at 139.
>
> and
>
> * * * unemployment benefits were intended to alleviate the economic insecurity arising from termination of employment the prevention of which was effectively beyond the employee's control."
> Murphy, 115 R.I. at 35, 340 A.2d at 139.

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, supra page 4, 98 R.I. at 200, 200 A.2d at 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

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

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

> * * * 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 properly disqualified from receiving unemployment benefits because she left work without good cause pursuant to section 28-44-17?

V. ANALYSIS

As stated above, the Board of Review found that claimant did not quit but was fired. This finding is critical to the case because it has not been asserted that she was terminated for proved misconduct. So, if she was fired, she would be eligible for benefits.

In its helpful memorandum the Pink Pineapple urges that the finding that Ms. Belmore was fired is incorrect and that the referee properly found that she was terminated because she failed to appear for work and thereby quit her position as a matter of law. As these conflicting decisions demonstrate, there exists persuasive evidence on both sides of the issue of Ms. Belmore's eligibility for unemployment benefits. But, in light of the limited

standard of review under which this Court considers unemployment appeal, I believe that this Court must affirm the Board's decision in this case. In order to reveal the reasons why I have concluded the Board's decision is not clearly erroneous and should be affirmed, I shall now review the events which led to Ms. Belmore's termination as they were described in the record, noting the consistencies and differences in the positions of the parties.

A. REVIEW OF THE RECORD

The claimant and her employer agree that before her termination Ms. Belmore had repeatedly questioned whether she and her fellow employees should have been receiving time-and-one-half pay on Sundays and holidays. Board of Review Hearing Transcript, at 5, 12, 24. On July 6, 2009, she called the Newport store, inquired whether the employees there were receiving the extra pay, and indicated she was going to the Labor Board. Board of Review Hearing Transcript, at 5-6, 8. Ms. Hall was told about the call, and telephoned Ms. Belmore at home. Board of Review Hearing Transcript, at 6, 21. The call was heated and eventually claimant hung up. Board of Review Hearing Transcript, at 6-7, 9. Ms. Belmore indicated she terminated the call due to abusive language, which Ms. Hall did not concede. Board of Review Hearing Transcript, at 6-7, 9, 22-24.

Ms. Hall testified she called back many times but claimant did not answer. Board of Review Hearing Transcript, at 22. According to Ms. Hall and her witness, she became unsure whether claimant would appear for her next shift on July 8, 2009; so they arranged for coverage. Board of Review Hearing Transcript, at 27, 32. Because Ms. Hall had the day off, she did not call claimant on the 7th of July. Board of Review Hearing Transcript, at 31. When Ms. Belmore reported for her next shift she was told she was to be relieved in

an hour. Board of Review Hearing Transcript, at 5, 10, 37. Ms. Belmore testified that Ms. Hall fired her at that time, indicating that — " ... I told you the next time you're out of line I have to let you go. And she said you can finish the hour and then leave, you're not needed anymore." Board of Review Hearing Transcript, at 5. This, in fact, occurred; she was relieved by an employee named Alana. Board of Review Hearing Transcript, at 10.

Ms. Hall denied she fired claimant (Board of Review Hearing Transcript, at 13, 27, 39-40) but conceded that she had previously given claimant such a warning — in March. Board of Review Hearing Transcript, at 30. She also agreed claimant never quit. Board of Review Hearing Transcript, at 33. Claimant did not appear for work again; neither claimant nor Ms. Hall contacted the other after July 8, 2009. When claimant failed to appear for work on the eleventh of July, she was fired. Board of Review Hearing Transcript, at 42.

B. REVIEW OF THE POSITIONS PRESENTED IN THE CASE.

1. The Board's Finding That Ms. Belmore Was Fired.

(a) *Claimant Was Expressly Fired.* We commence with the theory of the case which is before the Court for review: the Board's finding that claimant was eligible to receive benefits. The Board found, *inter alia*, that "... the credible testimony before the Board established that the claimant was terminated." Board of Review Decision, at 2. In finding that Ms. Belmore was fired (and did not quit) the Board was certainly entitled to rely on claimant's testimony that she was *explicitly* fired by Ms. Hall on July 8th. This evidence alone, if believed, is sufficient to support the Board's finding that claimant did not quit but was fired. Clearly, the Board credited her testimony. Undeniably, there was

circumstantial evidence to the contrary; among these were the fact that the employer left claimant alone in the store after she was allegedly fired and the fact that claimant was not required to give back her key.[4] Nevertheless, this Court's role is reviewing issues regarding the weight to be accorded evidence, such as the credibility to be given witnesses, is extremely limited. Cahoone, supra, at 7, fn. 2.

(b) *Claimant Was Fired Implicitly.* Although the Board seems to have accepted claimant's testimony that she was *expressly* fired on July 8, 2009, the evidence of record would also have supported a finding that she was *implicitly* fired by being sent home on the eighth of July and never being recalled for further service.

The Board's finding of an implied firing could have based on claimant's testimony that (1) she was sent home on July 8th;[5] (2) that she received no further communication from the employer. In these circumstances, the Board could well have found that claimant was given a reasonable impression that she was fired — especially since she was never disabused of the notion.

2. The Employer's Position: That Claimant "Quit" By Failing to Appear on July 11th.

The employer argues that the Ms. Belmore was not fired and that she quit by

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4 Regarding the second it may be noted that claimant's witness, Ms. Almeida, testified that she too was fired but was not required to turn in her key.

On the other hand, a circumstance which militates in *favor* of a finding that Ms. Belmore was terminated is the fact that she and Ms. Hall argued about her time-and-a-half pay. As described, it seemed like a discussion being had at the parting of the ways, and not such as would have occurred if the relationship was continuing.

5 It is curious that Ms. Hall, who was so concerned that Ms. Belmore would not be at work on the eighth of July that she immediately arranged for coverage, did not have someone from Pink Pineapple call claimant on the seventh to inform her that other

failing to appear for work for her next scheduled shift: on July 11, 2009. The legal principle which implicitly supports this argument, *i.e.,* that not appearing for work constitutes a quitting, has been previously invoked by the Board and recognized by this Court. See Jencks v. Department of Employment & Training Board of Review, A.A. 90-342, (Dist.Ct. 6/17/91)(DeRobbio, C.J.). Of course, this was the factual and legal basis of the Referee's decision. On its *de novo* review, the Board did not dispute this legal principle, but reversed the case because — as stated above — it found that claimant was fired.

The Board of Review could have adopted this version of events based on the testimony of Ms. Hall and her witness; their testimony that claimant was not fired on the eighth of July was clear; but the Board chose not to credit it. Again, this Court is not permitted to second-guess the Board on issues of credibility. Moreover, in rejecting this argument, the Board could rely on the specific testimony of Ms. Belmore that — prior to her termination — she was informed she had been removed from the July 11, 2009 schedule. Board of Review Hearing Transcript, at 45-46. This testimony was also contradicted by Ms. Hall. Board of Review Hearing Transcript, at 41-42.

C. SUMMARY.

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

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arrangements had been made and her services were not necessary on July 8, 2009.

questions of fact, including the question of which witnesses to believe.[6] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[7] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant did not voluntarily terminate her employment at the Pink Pineapple within the meaning of section 17 is supported by the evidence of record and must be affirmed.

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

7 Cahoone, supra n. 4, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Bd. of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra p. 6 and Guarino, supra p. 7, fn.1.

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).

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

Joseph P. Ippolito
MAGISTRATE

FEBRUARY 1, 2011

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Pink Pineapple, LLC	:	
	:	
v.	:	**A.A. No. 10 - 025**
	:	
Dept. of Labor & Training,	:	
Board of Review	:	

ORDER

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 on this 1st day of February, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge