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

Adejoke M. Jaiyeola	:	
	:	
v.	:	**A.A. No. 12 - 124**
	:	
Dept. 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, 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 Court at Providence on this 27th day of September, 2012.

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 the instant complaint Ms. Adejoke M. Jaiyeola urges that the Board of Review of the Department of Labor and Training erred when it held that she was not entitled to receive unemployment benefits. Jurisdiction to hear and decide appeals from decisions made by the 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. For the reasons stated below, I conclude that the decision of the Board in this matter should be affirmed; I so recommend.

FACTS & TRAVEL OF THE CASE

Ms. Adejoke Jaiyeola worked as a CNA for Heritage Hills LLC for eight

and one-half months. Her last day of work was December 30, 2011. She filed a claim for unemployment benefits on January 17, 2012 but the Director determined she left her job without good cause and was therefore disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and Referee Nancy Howarth held a hearing on the matter on March 26, 2012. Claimant appeared and testified. She was the sole witness.

In her April 6, 2012 decision, the Referee made the following Findings of Fact:

> The claimant was employed as a CNA by the employer. She was scheduled to work from 11pm on December 31, 2011 to 7am on January 1, 2012. The claimant had traveled to New York with her mother that day to meet with her father. She called the employer prior to the start of her shift to inform them that she would be unable to report to work at the start of her shift and that she expected to report by approximately 2am. The claimant did not return to Rhode Island on January 1, 2012 at approximately 4am. She called her supervisor the following day and was informed that she was not on the schedule. The claimant contacted a secretary on January 3, 2012. She was instructed to call again and speak to the Director of nursing, who was not available at that time. The claimant called later that day and was advised that the Director of Nursing was not in the building. The claimant made no subsequent attempts to contact the Director of Nursing.

Referee's Decision, April 6, 2012, at 1. Based on these findings, the Referee concluded that her failure to communicate constituted a leaving without good cause within the meaning of Gen. Laws 1956 § 28-44-17:

* * *

> In order to establish that she had good cause for leaving her job the claimant must show that the work had become unsuitable or that she was faced with a situation that left her no reasonable alternative other than to terminate her employment. The burden of proof in establishing good cause rests solely with the claimant. In the instant case, the claimant has not sustained this burden. The record is void of any evidence to indicate that the work itself had become unsuitable. The evidence and testimony presented at the hearing establish that the claimant did have a reasonable alternative, other than to terminate her employment. She could have contacted the Director of Nursing, as she was instructed. Since the claimant had a reasonable alternative available to her, which she chose not to pursue, I find that she voluntarily left her job without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, April 6, 2012, at 2. Accordingly, Referee Howarth affirmed the Director's decision denying benefits to Ms. Jaiyeola.

Claimant filed an appeal and the matter was considered by the Board of Review. In a written opinion issued on May 24, 2012, 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. Thereafter, on June 4, 2012, Ms. Jaiyeola filed a complaint for judicial review in the Sixth Division District Court.

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; R.I. Gen. Laws § 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.
>
> 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.

The court, as stated above, rejected the notion that the termination must be "under compulsion" or that the reason therefore must be of a "compelling nature."

Finally, it is well-settled that a worker who leaves her position voluntarily, who wishes to be declared eligible for unemployment benefits, must satisfy the burden of proving that she did so for good cause within the meaning of section 28-44-17.

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.' "[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, 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:

> * * * 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

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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. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

> to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

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 because she left work without good cause pursuant to section 28-44-17?

ANALYSIS

The Board of Review — adopting the findings of the Referee — determined that Ms. Jaiyeola quit her position because she failed to contact the Director of Nursing. Because the Claimant never expressly resigned her position, this is what is known as a "de facto quit" or a "constructive quit." At the hearing conducted by the Referee, Ms. Jaiyeola testified in support of her claim for benefits. Because the Director had found she had quit without good cause, she bore the burden of proof. Even though she was the sole witness, the Referee found she failed to sustain this burden.

Ms. Jaiyeola testified on December 31, 2011 she called in to say she was not going to be able to get back from New York, where she had gone to visit her father, in time for her scheduled shift — which was to have begun at 11:00 p.m. on December 31st. Referee Hearing Transcript, at 7. In fact, she did not get back

to Rhode Island until 4:00 a.m. on January 1, 2012. She called in on January 2, 2012 and was told she was a no-call/no-show. Referee Hearing Transcript, at 9. She called in on January 3, 2012 and attempted to speak to the Director of Nursing. Referee Hearing Transcript, at 10. She was directed to call back by the secretary; when she did she was told the Director of Nursing was out that day. Id. She never called back, apparently concerned, because of prior incidents, that she was about to be terminated. Referee Hearing Transcript, at 10-11.

The principle that an employer has a right to expect that its employees will maintain communication when on leave has been recognized by this Court on a number of occasions. See Sanchez v. Department of Labor and Training, Board of Review, A.A. No. 05-80, (Dist.Ct. 1/24/06)(Employee collecting TDI recipient deemed to have quit due to her failure to respond to employer inquiries and submit family leave request) and Fierlit v. Department of Employment and Training Board of Review, A.A. No. 93-162, (Dist.Ct. 2/3/94). Accordingly, Ms. Jaiyeola's failure to contact the Director of Nursing, as instructed, to resume her employment may properly be deemed to constitute a *de facto* or *constructive* quitting.

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 § 42-35-15(g), supra at 5 and Guarino, supra at 6, fn.1. The scope of judicial review by the District Court is also limited by General Laws section 28-44-54 which, in pertinent part, provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** 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.

Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated her employment by failing to contact her employer to resume her employment is supported by the substantial evidence of record and must be affirmed.

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, it 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 be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 27, 2012