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

Maria Varela	:	
	:	
v.	:	**A.A. No. 12 - 134**
	:	
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 & 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 except the order of repayment is REVERSED.

Entered as an Order of this Honorable Court at Providence on this 21st 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 this case Ms. Maria Varela urges that the Board of Review of the Department of Labor and Training erred when it held that she was ineligible to receive employment security benefits because she quit without good cause. 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 issued by the Board of Review denying benefits to Ms. Varela is supported by the facts of the case and the

applicable law and should be affirmed; accordingly, I so recommend.

I. FACTS & TRAVEL OF THE CASE

Ms. Maria Varela worked for Nursing Placement, Inc. as a homemaker for eight months until February 23, 2011. At that time her father died and she became ill. Claimant, who was restricted from working during this period, submitted documents justifying her absences. While out, she indicated to her employer that she wanted to drop her three regular clients, believing that she would be unable to properly service them when she returned to work; the employer responded that if she did so they could not guarantee her another assignment.

Claimant submitted a release to return to work dated March 30, 2012. At his juncture, the stories of Claimant and her employer diverge. She testified she was told they had no work — the employer says Ms. Varela told them she needed more time and would call when she was ready to return to work. In any event, she never returned to work.

She applied for unemployment benefits on November 7, 2011 but the Director deemed her ineligible because she had quit without good cause within the meaning of Gen. Laws 1956 § 28-44-17. She took an appeal and a hearing was held before Referee Carol A. Gibson on April 12, 2012. In her decision,

issued on April 16, 2012, the Referee found the following facts:

> 2. FINDINGS OF FACT
>
> The claimant had worked for the employer, a nursing placement agency, for approximately eight months as a homemaker through February 23, 2011. During the period the claimant was employed she was working with three clients twenty-one hours a week. Following her last day of work, the claimant's father, who lived in another county, passed away. The claimant requested time out of work due to deal with this loss. The claimant then became ill as a result of this situation. The claimant was under medical care and restricted from working March 10, 2011 through March 25, 2011. The claimant was in contact with the employer and submitting documentation for her leave time during the period she was absent from work. While the claimant was out of work, she contacted the employer and requested to drop her three regular clients. The claimant testified she did not believe she could provide them with the care they deserved once she returned to work. The employer states they informed the claimant if she dropped these clients, she would be losing the twenty-one hours and they could not guarantee her another assignment. The claimant provided the employer with a medical (sic) dated March 30, 2011 indicting (sic) she was released as able to work without restrictions. The claimant states she contacted the employer and they had no work to offer her. The employer states they spoke with the claimant on April 4, 2011 and they were ready to offer her a schedule with the three clients. The employer states the claimant indicated she needed additional time out of work and she would contact them when she was ready to work. The employer indicates they were not contacted by the claimant for a month following April 4, 2011 and at that time they had no assignments for the claimant.

Decision of Referee, April 16, 2012, at 1. Based on the foregoing facts, the Referee — after quoting extensively from Gen. Laws 1956 § 28-44-17 — came

to the following conclusions:

> In order to show good cause for leaving a job, the claimant must show that the work had become unsuitable or that she was faced with no reasonable alternative but to resign. The burden of proof rests solely with the claimant.
>
> In this case, the claimant has not sustained this burden. Although there was conflicting testimony, it is determined that the claimant voluntarily left the job when she requested to drop her assigned clients with the set work schedule of twenty-one hours a week. The claimant therefore did not return to her normal work schedule with the employer when she was medically released to work on March 30, 2011. There is no evidence medical or otherwise to establish the claimant was unable to work with these clients or that she could not return to work on April 4, 2011. Therefore, it is determined that the claimant left the job without good cause within the meaning of the above Section of the Act and, is not entitled to benefits in this matter.

Decision of Referee, April 16, 2012, at 3-4. Based on this reasoning, Referee Gibson held that Claimant Varela voluntarily quit and should be disqualified from receiving unemployment benefits pursuant to Gen. Laws 1956 § 28-44-17.

Claimant appealed and the Board of Review reviewed Ms. Varela's case. On May 30, 2012 the Board issued a unanimous opinion finding that the Decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Finally, on June 22, 2012, Ms. Varela 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.
>
> 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 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

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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).

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:

> * * * 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.

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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).

IV. ANALYSIS

In this case, the Board determined that claimant left her job without good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act.

A. A Review of the Facts of Record.

At the hearing before the Referee, Ms. Varela gave testimony in support of her claim for benefits, explaining — from her perspective — the circumstances of her separation from Nursing Placement. She said she worked for the company as a part-time homemaker for six months — until February 22, 2011. Referee Hearing Transcript, at 19, 29-30. The next morning she did not report to work because she had received a phone call from Cape Verde that her father had died. Referee Hearing Transcript, at 19. She formally requested — and received — a few days off for bereavement. Referee Hearing Transcript, at 20-21. Because she was unable to attend the funeral, she fell into a depression. Referee Hearing Transcript, at 19. She consulted a doctor on March 11, who gave her a note excusing her from work until March 25, 2011. Referee Hearing Transcript, at 23.

On March 24, 2012, she called her employer to indicate her readiness to return to work on March 25, 2012 but the employer insisted it needed a

doctor's letter stating she was ready to work. Referee Hearing Transcript, at 24. She tried to obtain such a letter, but the doctor's office declined to provide one until her next appointment — on the 30th. Id. She gave the letter she received to her employer, but was told they had nothing for her at that time. Referee Hearing Transcript, at 25. She says she repeatedly followed up with them, but received no offers of work. Referee Hearing Transcript, at 25-26.

In response to a question from the Referee, Ms. Varela denied she had asked for additional time off after March 30th. Referee Hearing Transcript, at 26-27. She also denied telling her employer that she would call them when she was ready to return. Referee Hearing Transcript, at 27. But she admitted that she told her employer on March 14, 2012 that she wanted to drop her current clients — and get new clients — because she cared about them and did not want to do a "mediocre" job for them. Referee Hearing Transcript, at 28.

Answering a question posed by her employer, she denied that she told her employer on March 10, 2011 that her doctor said it would be best if she returned to work. Referee Hearing Transcript, at 32. And, she denied that — in the conversation of March 14th — she was warned that if she gave up her clients she might lose hours of work. Referee Hearing Transcript, at 33-34. She conceded she could not work as a CNA because her license had expired.

Referee Hearing Transcript, at 36.

In sum, Ms. Varela took the position that she did not quit, but was laid off.

Ms. Maria Silva, staffing coordinator, confirmed that Claimant worked as a 21-hour per week homemaker for Nursing Placement for six months. Referee Hearing Transcript, at 38. She confirmed that, when Ms. Varela requested additional time off, she was required to put it in writing — which she did on March 7th. Referee Hearing Transcript, at 39-40.

Ms. Silva confirmed that on March 10, 2011, Ms. Varela asked to handle new cases. Ms. Silva testified she told Ms. Varela that she had no new homemaking cases to offer her. Referee Hearing Transcript, at 41. She insisted she warned Claimant that if she gave up her clients she could lose the 21 hours per week she was working. Referee Hearing Transcript, at 42. She also confirmed that Ms. Varela provided Nursing Placement with a physician's note allowing her to return to work on March 30, 2011. Referee Hearing Transcript, at 43.

Next, Ms. Silva testified regarding what I believe to be the most significant aspect of her testimony. She described her April 4, 2011 telephone conversation with Ms. Varela. She had called the Claimant to go over her

schedule but Ms. Varela was not interested in resuming her caseload, and said that "she needed more time." Referee Hearing Transcript, at 44-45. She confirmed that Ms. Varela called once more but they had no cases. Referee Hearing Transcript, at 46.

Ms. Martha Perez, the nursing supervisor, also testified. Referee Hearing Transcript, at 49. She confirmed that Claimant told her, on March 11, 2011, that she did not wish to return to her prior clients. Referee Hearing Transcript, at 50. She was able to recall no conversations with Ms. Varela after March 30, 2011. Referee Hearing Transcript, at 52.

Finally, Ms. Lynn DeGuilio, the employer's human resource manager, testified. She corroborated earlier testimony that Claimant kept her employer informed while she was absent after the death of her father. Referee Hearing Transcript, at 54. But generally, her testimony conveyed a sense that she had only limited direct contact with Claimant during these proceedings. Referee Hearing Transcript, at 54-56. Finally, she submitted a copy of a condition-of-employment agreement the Claimant signed when she was hired by Nursing Placement, in which she agreed to actively seek assignments. Referee Hearing Transcript, at 57.

In sum, the employer's testimony, if believed, demonstrates that Claimant dropped her hours and refused to report to work, although her medical excuse had expired. The employer took that as a de facto quitting.

B. Validity of the Referee's Findings — In Light of the Facts of Record.

I have gone through the extended process of recounting the testimony received by the Referee because I believe this case is much simpler than it is painted in the Referee's decision. This may seem paradoxical. However, I believe it is apparent that much of the discussion at the hearing was patently irrelevant to the adjudication of this case. By enumerating the testimony, I hope that has become clear.

For instance, except for the context they provide, the narratives of Claimant's behavior during her bereavement are irrelevant. She was out of work with permission and that is all we need know. In my view, the key to the case is the conversation on April 4, 2011 with Ms. Silva. According to Ms. Silva, she offered Ms. Varela the opportunity to return to her previous schedule and Ms. Varela refused. The Referee was entitled to rely on this testimony in finding that Claimant refused to return to work despite being offered the opportunity to do so. This testimony, per se, supplies a sufficient basis in the record for Referee Gibson's finding that Claimant quit her position — if not

expressly, then by her actions, a de facto quitting. It is clear that her failure to return to work was not justified by any medical excuse — at least none presented on the record — for she had been medically released back to work. The Referee, as the evaluator of credibility and the finder of fact, was entitled to disregard Claimant's testimony to the contrary.

C. Resolution of the Issue.

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, including the question of which witnesses to believe.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5] Accordingly, the Board's decision that claimant voluntarily terminated her employment at Nursing Placement without good cause within

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

[5] 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. 7 and Guarino, supra p. 7, fn. 1.

the meaning of section 17 is supported by the evidence of record and must be affirmed.

REPAYMENT

Finally, Claimant was ordered to repay over $2,321.00 by the Director. In her decision, issued on March 8, 2012, the Referee made the following Findings of Fact on the issue of repayment:

> **2. FINDINGS OF FACT:**
>
> The record indicates the claimant filed for benefits indicating she was laid off due to lack of work. As a result of that representation, the claimant received benefits totaling $2,321.00.

Referee's Decision, April 16, 2012, at 2. Based on these findings the Referee arrived at the following conclusion:

> **3. CONCLUSION:**
>
> * * *
> The claimant filed her claim for Employment Security Benefits without disclosing that she had requested to have new clients or that she had requested additional time off after being released by her doctor. Based on the claimant's failure to disclose information regarding her employment and separation from employment, she received Employment Security Benefits during a period of disqualification. The claimant is at fault for the overpayment and subject to make restitution.

Referee's Decision, April 16, 2012, at 4. Accordingly, the Referee found claimant both overpaid and at fault for the overpayment.

In so finding, the Referee applied Gen. Laws 1956 § 28-42-68, which provides in pertinent part:

> (a) Any individual who, by reason of a mistake or misrepresentation made by himself, herself, or another, has received any sum as benefits under chapters 42 - 44 of this title, in any week in which any condition for the receipt of the benefits imposed by those chapters was not fulfilled by him or her, or with respect to any week in which he or she was disqualified from receiving those benefits, shall in the discretion of the director be liable to have that sum deducted from any future benefits payable to him or her under those chapters, or shall be liable to repay to the director for the employment security fund a sum equal to the amount so received, plus, if the benefits were received as a result of misrepresentation or fraud by the recipient, interest on the benefits at the rate set forth in § 28-43-15.
> * * *
> (b) <u>There shall be no recovery of payments from any person who, in the judgment of the director, is without fault on his or her part</u> and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title. (Emphasis added).

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was at fault and where recovery would not defeat the purposes of the Act. In this case the Referee found fault — not from any affirmative misstatements but from an omission — because she failed to inform the Department that she had declined to return to work and that she had indicated a desire to drop her clients. However, I am not satisfied fault has been shown.

I believe the finding of fault made in this case is inadequate for three reasons.

First, the Department offered no testimony regarding what Claimant said when she filed her claim. Second, the Referee — who conducted the hearing in the absence of counsel — failed to draw Ms. Varela's attention to the topic — she therefore did not truly have a meaningful opportunity to be heard on the issue, raising, in my view, due process concerns. Third and finally, I have recommended the decision below on the basis of a de facto, not an express, quitting. In such cases findings of deceptive intent are difficult, at best. For instance, it is uncontested here that Claimant never expressly quit.; it is also true that, when she later called, the employer indicated they had no work for her. And so, I find no circumstances which could fairly be deemed "fault" within the meaning of the repayment statute. Accordingly, I believe the order of repayment is clearly erroneous.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review on the issue of eligibility was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, the 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 be AFFIRMED except that the order of repayment is REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 21, 2012