

**STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.**

**DISTRICT COURT  
SIXTH DIVISION**

**Juan Rosales**

:

v.

:

**A.A. No. 14 - 074**

:

:

**Department of Labor and 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 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 hereby REVERSED.

Entered as an Order of this Court at Providence on this 29<sup>th</sup> day of May, 2015.

By Order:

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen C. Waluk  
Chief Clerk

Enter:

\_\_\_\_\_/s/\_\_\_\_\_  
Jeanne E. LaFazia  
Chief Judge

STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS  
PROVIDENCE, Sc.

DISTRICT COURT  
SIXTH DIVISION

Juan Rosales :  
 :  
v. : A.A. No. 14 – 074  
 :  
Department of Labor and Training, :  
Board of Review :

**FINDINGS & RECOMMENDATIONS**

**Ippolito, M.** In this case Mr. Juan Rosales urges that the Board of Review of the Department of Labor and Training erred when it held him to be disqualified from receiving unemployment benefits because he left his position at Rhode Island Hospital without good cause, as provided in Gen. Laws 1956 § 28-44-17. Jurisdiction for appeals from decisions of the Department of Labor and Training 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.

Employing the standard of review applicable to administrative appeals, I find that the decision rendered by the Board of Review on the issue of eligibility is clearly erroneous and contrary to law; I 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. Juan Rosales was employed for twenty-two years as a “prep technician” by Rhode Island Hospital until his last day of work, December 20, 2013. He filed a claim for unemployment benefits on December 24, 2013; then, on February 6, 2014, a designee of the Director awarded benefits to Mr. Rosales — finding that he left his position for good cause within the meaning of Gen. Laws 1956 § 28-44-17, when he declined a last-chance agreement in the absence of any proof of misconduct.<sup>1</sup>

The employer filed an appeal and on March 11, 2014 Referee Nancy L. Howarth conducted a hearing on the matter. Mr. Rosales appeared with counsel; a representative of the employer, Ms. Rea Ashlie, was also present, as was the employer’s agent. Six days later, Referee Howarth issued a decision

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<sup>1</sup> See Decision of Director, February 6, 2014, at 1.

reversing the Director's award of benefits to Claimant, based on a finding that he quit without good cause as defined in § 28-44-17.<sup>2</sup>

Referee Howarth arrived at this decision by making the following findings of fact:

The claimant was employed as a prep technician for the employer. The claimant had received four warnings between October 7, 2013 and December 17, 2013 in relation to his job performance. The employer intended to terminate the claimant on Friday, December 20, 2013. A meeting was held that day with the claimant, his union representative, the claimant's supervisor, the union liaison and a human resources representative. At the union's request, the employer agreed to allow the claimant to remain employed upon execution of a last chance agreement. The claimant indicated he would accept the agreement. However, the claimant did not report for his next scheduled shift on December 23, 2013. He had decided not to accept the last chance agreement, since he would be required to waive any rights to file a grievance regarding the matter. He did not contact the employer or report to work again. The employer considered that the claimant had voluntarily quit his job.<sup>3</sup>

Which led her to make the following conclusions:

\* \* \*

In order to establish that he had good cause for leaving his job, the claimant must show that the work had become unsuitable or that he was faced with a situation that left him no reasonable alternative other than to terminate his 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.

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<sup>2</sup> See Decision of Referee, March 17, 2014, passim.

<sup>3</sup> See Decision of Referee, March 17, 2014, at 1.

The record is void of any evidence to indicate that the work itself was unsuitable. The evidence and testimony presented at the hearing establish that the claimant did have a reasonable alternative, other than to voluntarily leave his job. He could have accepted the last chance agreement and preserved his employment. Since the claimant had a reasonable alternative available to him, which he chose not to pursue, I find that his leaving is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.<sup>4</sup>

In sum, Referee Howarth found that Mr. Rosales had a “reasonable alternative” to unemployment — i.e., signing the last chance agreement. Accordingly, she reversed the Director’s decision granting benefits to Mr. Rosales.<sup>5</sup>

Claimant filed a timely appeal and, on April 22, 2014, the matter was decided by the Board of Review on the basis of the record certified to it.<sup>6</sup> The Board unanimously affirmed the decision of Referee Howarth, finding it to be a proper adjudication of the facts and the law applicable thereto; in fact, the Board adopted the Referee’s decision as its own.<sup>7</sup>

On May 21, 2014, Mr. Rosales filed a complaint for judicial review in the Sixth Division District Court. Thereafter, a conference was conducted by the undersigned with counsel for the Claimant, the Employer, and the Board of

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<sup>4</sup> See Decision of Referee, March 17, 2014, at 2.

<sup>5</sup> See Decision of Referee, March 17, 2014, at 2.

<sup>6</sup> This procedure is authorized by Gen. Laws 1956 § 28-44-47.

<sup>7</sup> See Decision of Board of Review, April 22, 2014, at 1.

Review, at the conclusion of which a briefing schedule was set. I should like to acknowledge that learned and helpful memoranda have been received from the Appellant-Claimant and the Appellee-Hospital.

## II APPLICABLE LAW

### A Leaving For Good Cause — The Statute

The issue in 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.** – (a) ... For benefits years beginning on or after July 1, 2012, and prior to July 6, 2014, an individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week in which the voluntary quit occurred and 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 greater than, or equal to, his or her benefit rate 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 with good cause’ shall include:

- (1) Sexual harassment against members of either sex;
- (2) Voluntarily leaving work with an employer to accompany, join, or follow his or her spouse to a place, due to a change in location of the spouse’s employment, from which it is impractical for such individual to commute; and

(3) The need to take care for a member of the individual's immediate family due to illness or disability . . . .

(b) 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; provided, 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.

As we can see, eligibility for unemployment benefits under § 17 has three conditions — first, that the claimant left his or her prior employment (an element that is seldom litigated since in most cases the resignation is transmitted verbally, often in writing); second, that the resignation was voluntary, which is separate and distinct from the first element; and third, that the claimant left the position for good cause as defined in § 17 (which is § 17's most frequently litigated element).

And so, we shall now proceed to provide some background regarding each of these elements, in reverse order — beginning with a few general comments regarding the concept of good cause, followed by a discussion of voluntariness, and finally, a discussion of the element of the leaving, and how it

can be satisfied in the absence of an express communication by conduct — through the concept of what has been called the “constructive quit.”

## **B**

### **Leaving Voluntarily For Good Cause — The Element of “Good Cause”**

In the case of Harraka v. Board of Review of Department of Employment Security (1964)<sup>8</sup>, 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 (1975),<sup>9</sup> the Supreme Court elaborated that:

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<sup>8</sup> 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964).

<sup>9</sup> 115 R.I. 33, 340 A.2d 137 (1975).

The Employment Security Act was intended to protect individuals from the hardships of unemployment the advent of which involves a substantial degree of compulsion.<sup>10</sup>

And the Murphy Court added:

\* \* \* 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."<sup>11</sup>

And finally, in Powell v. Department of Employment Security, Board of Review (R.I. 1984),<sup>12</sup> the Court clarified that "... the key to this analysis is whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control."<sup>13</sup>

## C

### **Leaving Voluntarily For Good Cause — "Voluntariness"**

First off, we must state that this element is not redundant to the element of the leaving (i.e., the resignation). Our Supreme Court has interpreted § 17, in Kane v. Women and Infants Hospital of Rhode Island (1991),<sup>14</sup> in a manner

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<sup>10</sup> Murphy, 115 R.I. at 37, 340 A.2d at 139.

<sup>11</sup> Murphy, 115 R.I. at 35, 340 A.2d at 139.

<sup>12</sup> 477 A.2d 93 (R.I. 1984).

<sup>13</sup> 477 A.2d at 96-97. Also, Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (R.I. 2000).

<sup>14</sup> Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991).

that gives individual effect<sup>15</sup> to the word “voluntarily,” declaring that —

To recover under § 28-44-17, an employee must leave for both good cause and voluntarily.”<sup>16</sup>

This means, however anomalous or inconsistent it may seem, that a finding that a worker resigned from a position is not legally incompatible with a finding that the worker did so involuntarily.<sup>17</sup> To flesh out this challenging but intriguing concept, we will now review the Kane case (a cornerstone of our jurisprudence on § 17 voluntariness) in a bit more depth.

In Kane, the Court considered the unemployment-benefit claim of a hospital employee who, when facing discharge for misconduct, took an early retirement.<sup>18</sup> The Court did not have to decide whether Ms. Kane quit for reasons constituting good cause under § 17, often a thorny question, because the statute dictated such a finding — by declaring quitting pursuant to a retirement plan to be good cause per se.<sup>19</sup> And so, with the good cause issue

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<sup>15</sup> This result was consistent with the precept of statutory interpretation that “the court will give effect to every word, clause, or sentence, whenever possible.” State v. Bryant, 670 A.2d 776, 779 (R.I. 1996).

<sup>16</sup> Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991)(Emphasis in original).

<sup>17</sup> Kane, 592 A.2d at 139-40.

<sup>18</sup> Kane, 592 A.2d at 138.

<sup>19</sup> For the language of this provision as it then existed, see Kane, 592 A.2d at

resolved, the Court was free to focus its attention on the element of voluntariness — which it had never grappled with previously.<sup>20</sup>

The Court began by stating the majority rule thusly —

... Most jurisdictions hold that if an employee resigns because of a reasonable belief that he or she is about to be discharged for job performance, then the resignation is not voluntary. See Matter of Werner, 44 N.C. App. 723, 725-29, 263 S.E.2d 4, 6-7 (1980)(an employee who resigns at his employer’s request because the employer is no longer “pleased” with his job performance did not resign voluntarily); Norman Ashton Klinger Associates v. Unemployment Compensation Board of Review, 127 Pa. Commw. 293, 295-98, 561 A.2d 841, 842-43 (1989)(an employee who resigns upon being told he would be discharged, not for willful misconduct, did not resign voluntarily). These cases examine the voluntariness of the resignation according to whether the employee acted of his or her own free volition. Green v. Board of Review of Industrial Commission, 728 P.2d 996, 998 (Utah 1986). Even though an employee may be given a choice to resign or be fired, “if that choice is not freely made, but is compelled by the employer, that is not an exercise of volition.” Id. An employee who wishes to continue employment, but nonetheless resigns because the employer has clearly indicated that the employment will be terminated, does not leave voluntarily. Perkins v. Equal Opportunity Commission, 234 Neb. 359, 362, 451 N.W.2d 91, 93 (1990).<sup>21</sup>

Thus, the majority rule was that a claimant who quit in the face of a discharge for poor performance was regarded as having quit involuntarily; the Kane

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138. Section 17 no longer contains this provision.

<sup>20</sup> See Kane, 592 A.2d at 139.

<sup>21</sup> See Kane, 592 A.2d at 139.

Court embraced and extended this rule, bringing within its orbit those who resign while facing discharge for misconduct.<sup>22</sup> So, in Rhode Island, one who quits in the face of a termination for misconduct does not quit voluntarily.<sup>23</sup>

Next, we shall offer a few comments on the element of the “leaving.”

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<sup>22</sup> See Kane, 592 A.2d at 139.

<sup>23</sup> The next question in this series has been addressed by this Court on a few occasions, but it has not yet been decided by our Supreme Court. That question is: Are those who retire in anticipation of a discharge without cause, such as lay-offs for purely financial reasons, eligible for benefits?

Most of these cases turned on the issue of good cause (focusing to a great extent on the reliability of the information the claimant had received regarding the likelihood of layoffs). E.g. Hill v. Department of Labor and Training, Board of Review, A.A. No. 00-54, slip op. at 7, (Dist.Ct. 9/6/2001)(Quirk, J.)(Good cause not found where Claimant’s fears of a future layoff were based on “speculation” and not well-founded.). See also Fogarty, Director of the Department of Labor and Training v. Board of Review of the Department of Labor and Training (Geraldine Asher), A.A. No. 11-61, slip op. at 3, 5-6 (Dist.Ct. 3/26/2012)(Gorman, J.).

But other cases have recognized the relevance of the issue of voluntariness. E.g. Colavita et al. v. Dept. of Labor and Training, Board of Review, A.A. No. 04-30, slip op. at 4 (Dist.Ct. 06/09/2005) (Moore, J.)(Board denied claims of workers who had accepted a 2003 Verizon termination package; this Court reversed on two grounds: first, the Court found that the leavings were not voluntary but made under compulsion since their fears of future termination were “real”; second, the claimants’ reasonable belief that they were facing layoffs provided good cause to quit.) and Verizon New England v. Dept. of Labor and Training, Board of Review (April Kuzdeba), A.A. No. 12-086, slip op. at 24-29, (Dist.Ct. 11/27/12).

## D

### Leaving Voluntarily For Good Cause — Leaving by “Constructive Quit”

The Board of Review found that Mr. Rosales constructively quit by refusing to sign the last chance agreement.<sup>24</sup> The Hospital does not object to this finding, but posits that Mr. Rosales expressly resigned when his union representative stated (on his behalf) that he would “take” the termination.<sup>25</sup>

The Employer also asserts that Mr. Rosales may also be deemed to have quit implicitly by failing to appear for work on Monday;<sup>26</sup> in support of this argument the Employer cites a case that was decided under the theory of the “constructive quit,” which provides that the § 17 element of a “leaving” may be fulfilled not only by an express verbal resignation — but also by conduct;<sup>27</sup> nationally, this theory is known as the doctrine of “constructive voluntary leaving.”<sup>28</sup> So that we may later comment on this argument, we shall now present a short overview of this doctrine as it exists nationally and locally.

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<sup>24</sup> See Referee Hearing Decision, at 2.

<sup>25</sup> See Appellee-Employer’s Memorandum of Law, at 4-5.

<sup>26</sup> See Appellee-Employer’s Memorandum of Law, at 5.

<sup>27</sup> See Appellee-Employer’s Memorandum of Law, at 5 citing Jaiyeola v. Department of Labor and Training, Board of Review, A.A. No. 12-124, slip op. at 7-9 (Dist.Ct. 9/27/2012).

<sup>28</sup> It is more formally titled by many courts the doctrine of “constructive voluntary leaving.” 76 AM. JUR. 2d Unemployment Compensation, § 105

## The Doctrine — As Generally and Nationally Viewed

I present here what I believe to be — after reviewing many cases — a consensus statement of the doctrine. It is taken from a 1997 decision of the Hawaii appeals court —

We begin our analysis with a brief explanation of the doctrine of “constructive voluntary leaving.” The doctrine is generally understood to be a concept whereby an employee who acts in a way which might result in his discharge, and does in fact result in his discharge, is deemed to have left his employment without good cause — thereby losing the right to claim unemployment benefits. Echols v. Michigan Employment Security Commission, 380 Mich. 87, 155 N.W. 2d 824 (1968). Under the doctrine, the employee’s actual intent to terminate the employment is not relevant. What is relevant is the foreseeability of termination resulting from the conduct.<sup>29</sup>

And so, the doctrine, as it is applied nationally, is said to focus less on the claimant’s subjective intent when committing the act that led to his or her termination and more on whether termination was a foreseeable consequence of the act.<sup>30</sup>

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and 81 C.J.S. Social Security and Public Welfare, § 406. It is also known as the “doctrine of provoked discharge.” See James v. Levine, 34 N.Y. 2d 491, 358 N.Y.S.2d 411, 411-413, 315 N.E.2d 471, 472 (1972).

<sup>29</sup> See Keanini v. Akiba, 84 Hawai’i 407, 412, 935 P.2d 122, 127 (Haw. App. 1997) (Emphasis added).

<sup>30</sup> See Keanini, ante, and Bertini v. Administrator, Unemployment Compensation Act, 39 Conn. Supp. 328, 331, 464 A.2d 867, 870 (Conn.

The doctrine has been accepted in some jurisdictions,<sup>31</sup> rejected in others.<sup>32</sup>

Those Courts that reject the doctrine often do so for various reasons — because

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Super. 1983)(“The doctrine of constructive quit or constructive leaving is a concept ... which allows one to infer or to presume from the voluntary actions of an employee that he caused a circumstance which he knew or should have known would result in his being discharged from his employment.”)(Emphasis added).

<sup>31</sup> See 76 AM. JUR. 2d Unemployment Compensation, § 105 and 81 C.J.S. Social Security and Public Welfare, § 406; in Keanini v. Akiba, 84 Hawai’i at 411, 935 P.2d at 127 n. 6, the Court declared that, as of the date of its opinion, the states recognizing the “constructive voluntary leaving” doctrine included California, Michigan, New Jersey, New York, and Massachusetts.

In James, ante, at 12 n. 28, 34 N.Y. 2d at 494-96, 358 N.Y.S.2d at 412-414, 315 N.E.2d at 472-74, the Court traced the origins of the doctrine of “provoked discharge,” as it is known in New York, to a case (not a statute) involving union activities and collective bargaining agreements, “where special policy considerations were at work.” This seminal case was Matter of Malaspina (Corsi), 309 N.Y. 413, 131 N.E. 2d 709, in which the employer was compelled by the collective bargaining agreement to discharge the claimant, who knew it was required, had refused to join the union. The Court in James called the Malaspina decision a “legitimate and essential gloss on the statute to fill a gap. It did not purport to, nor might it, create a third and distinct category for determining ineligibility for unemployment insurance benefits ... .” Id., 34 N.Y. 2d at 494-95, 358 N.Y.S.2d at 413, 315 N.E.2d at 472-73.

<sup>32</sup> See 76 AM. JUR. 2d Unemployment Compensation, § 105 and 81 C.J.S. Social Security and Public Welfare, § 406; in Keanini, the Hawaii Court of Appeals declared that, as of the date of its opinion, the states rejecting the “constructive voluntary leaving” doctrine included Maryland, Maine, Connecticut, and Vermont. Id., 84 Hawai’i at 411, 935 P.2d at 127, n. 6.

The Keanini Court rejected the doctrine in case of a truck driver whose license was suspended for driving his personal vehicle without insurance — and finding Claimant was not, as required by statute, the “moving party” with regard to the termination. Id., 84 Hawai’i at 412, 935 P.2d at 127.

the doctrine conflicts with their leaving-for-good-cause statutes which require proof of voluntariness,<sup>33</sup> not foreseeability;<sup>34</sup> or because the doctrine invades the province of the statutorily created misconduct disqualification;<sup>35</sup> or on general policy grounds.<sup>36</sup>

But courts everywhere have feared that unless the rule is narrowly defined, a great many terminations could be inappropriately deemed within its ambit.<sup>37</sup> And so, even in jurisdictions that have accepted the doctrine, courts have nonetheless attempted to keep it reined in.<sup>38</sup>

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<sup>33</sup> See Keanini, 84 Hawai'i at 412, 935 P.2d at 127; and see Fitzhugh v. New Mexico Department of Labor, Employment Security Division, 122 N.M. 173, 181-82, 922 P.2d 555, 563-64 (1996) (Declining to apply constructive quitting theory to case of office worker who suffered emotional breakdown and was absent for extended period, indicating that it would instead focus on whether the claimant intended to retain his position — or not).

<sup>34</sup> See Keanini, 84 Hawai'i at 412, 935 P.2d at 127;

<sup>35</sup> See James, ante, 34 N.Y. 2d at 494-98, 358 N.Y.S.2d at 413-416, 315 N.E.2d at 473-75 (Court of Appeals declines to extend reach of the doctrine of provoked discharge to encompass claimants guilty of misconduct).

<sup>36</sup> See Keanini, 84 Hawai'i at 414, 935 P.2d at 129 (Noting the fundamental conflict between the doctrine and policy that the statute be liberally construed to alleviate the stress of economic security).

<sup>37</sup> See 81 C.J.S. Social Security and Public Welfare, § 406, citing Fitzhugh v. New Mexico Department of Labor, Employment Security Division, 122 N.M. 173, 922 P.2d 555 (1996).

<sup>38</sup> See James, 34 N.Y. 2d at 498, 358 N.Y.S.2d at 416, 315 N.E.2d at 475, the Court indicated its holding in Malaspina, the seminal labor-related provoked-discharge case in New York, discussed ante at n. 31, would

## The Doctrine in Rhode Island

The doctrine's vitality in Rhode Island is uncertain, for it has never been accepted (or rejected) by our Supreme Court. However, it has been applied in a number of cases by this Court, predominantly in situations where the Claimant had broken off communications with his or her employer — typically, while out on an extended family leave<sup>39</sup> or while incarcerated,<sup>40</sup> or in other cases wherein the Claimant simply was AWOL (absent without leave).<sup>41</sup>

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remain vital only in situations where the employer's termination was involuntary and traceable to the voluntary acts of the Claimant.

<sup>39</sup> See Sanchez v. Department of Labor and Training, Board of Review, A.A. No. 05-80, (Dist.Ct. 1/24/06)(Employee collecting TDI 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).

<sup>40</sup> See O'Grady v. Department of Employment and Training, Board of Review, A.A. No. 93-177 (Dist. Ct. 2/16/1994)(DeRobbio, C.J.)(Slip op. at 7-8) (Claimant's inability to work due to incarceration for breaking and entering charge held not to constitute termination for good cause within the meaning of § 28-44-17) and Calise & Sons Bakery v. Dept. of Employment Security, Board of Review, A.A. No. 89-51, (Dist.Ct. 10/2/1989)(Pirraglia, J.). See also Semenuk v. Department of Employment and Training, Board of Review, A.A. No. 13-056, slip op. at 10-11 (Dist. Ct. 5/21/2013)(Claimant's inability to work due to attendance in residential drug program).

<sup>41</sup> See Paquette v. Department of Labor and Training Board of Review, A.A. No. 12-215, slip op. at 10-11 (Dist.Ct. 12/19/2012)(Failing to return to work and maintain contact after expiration of approved vacation in order to address problems regarding rental property he owned in South Carolina).

Our constructive quit cases, unlike the national, have not emphasized foreseeability. Instead, they have keyed on the inference of job abandonment. These cases tend to emphasize the theoretical basis for the doctrine, job abandonment.

Issues of attendance, whether absenteeism or tardiness or leaving before the end of one's shift have historically been addressed under section 28-44-18 of the Employment Security Act, which provides for disqualification based on proved misconduct. It is true, however, that certain cases in which an employee has broken off communications with the employer have been addressed under section 17 based upon a theory of a de facto quitting or a constructive quitting. See Sanchez v. Department of Labor and Training, Board of Review, A.A. No. 05-80, (Dist.Ct. 1/24/06) (Employee collecting TDI 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). But, in my view, the facts in this case do not support a theory of a de facto or constructive quitting.

When the Board finds a constructive quitting we are inferring that the worker has abandoned her job; in such cases we must glean from the facts and circumstances an unexpressed desire on the part of the claimant to terminate her position. Where we cannot divine such an intention, the claimant's absenteeism must be analyzed for misconduct under section 18.<sup>42</sup>

So, it would appear that under Rhode Island practice we do not focus on the issue of foreseeability but on whether the worker truly intended to separate.

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<sup>42</sup> See Belanger v. Department of Labor and Training Board of Review, A.A. No. 12-241, slip op. at 12 (Dist.Ct. 02/18/2013).

### 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.’”<sup>43</sup> 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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<sup>43</sup> Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d

fact.<sup>44</sup> Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>45</sup>

The Supreme Court of Rhode Island recognized in Harraka,<sup>46</sup> that a liberal interpretation shall be utilized in construing the 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.<sup>47</sup>

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425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

<sup>44</sup> Cahoone v. Board of Review of the Dept. of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

<sup>45</sup> Cahoone v. Board 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).

<sup>46</sup> Harraka, ante at 7, 98 R.I. at 200, 200 A.2d at 597.

<sup>47</sup> Harraka, id.

IV  
ANALYSIS

A  
Evidence of Record

1  
Testimony of Claimant Rosales

At the March 11, 2014 hearing conducted by Referee Howarth the first witness was the Claimant, Mr. Rosales.<sup>48</sup> He began his testimony under questioning by Referee Howarth.<sup>49</sup> He stated that his employment began in July of 1991 and ended on December 20, 2013, at which time he held the position of “Cytology Technician.”<sup>50</sup> Claimant denied he quit, asserting that he had been discharged for what was called “poor performance.”<sup>51</sup> With these preliminary points on the record, the Referee turned the questioning over to Claimant’s counsel.<sup>52</sup>

Under questioning by his counsel, Mr. Rosales conceded that he was

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<sup>48</sup> Referee Hearing Transcript, at 6 *et seq.*

<sup>49</sup> Referee Hearing Transcript, at 6.

<sup>50</sup> Referee Hearing Transcript, at 7.

<sup>51</sup> Id.

<sup>52</sup> Id.

offered a last chance agreement as an alternative to immediate termination.<sup>53</sup> But there was a condition on this offer — that he could be fired for any “mistake” during the next year and one-half and he could not appeal such a decision (i.e., file a grievance).<sup>54</sup> Of course, if he declined he would be fired, but he retained his right to appeal his discharge.<sup>55</sup> And this is in fact what transpired — he did decline the last-chance agreement and, when he was terminated, he appealed.<sup>56</sup>

Finally, Claimant was questioned by the Employer’s agent.<sup>57</sup> He said he was terminated at a meeting with Human Resources and the Union.<sup>58</sup> Referee Hearing Transcript, at 9. Mr. Rosales denied that he ever accepted the last-chance agreement, but said that he needed to speak to his own union representative, since the one that was at the meeting was unable to fully explain it to him.<sup>59</sup> And so, over the weekend, he did speak to his union president, Ms. Helen Machado, and concluded it was “a set up to get me fired and then

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<sup>53</sup> Referee Hearing Transcript, at 7-8.

<sup>54</sup> Referee Hearing Transcript, at 8.

<sup>55</sup> Id.

<sup>56</sup> Referee Hearing Transcript, at 8-9.

<sup>57</sup> Referee Hearing Transcript, at 9.

<sup>58</sup> Id.

without me having a chance to grieve it in any sort of way.”<sup>60</sup> As a result, he told the union president that he would not consent to the last-chance agreement.<sup>61</sup> Mr. Rosales was also told by Ms. Machado that if he went to work on Monday, it meant he was accepting the last-chance agreement.<sup>62</sup>

While Mr. Rosales stated he was never called by anyone at the hospital saying he was fired, he did acknowledge that — “a while after” — he received a termination letter from Rhode Island Hospital.<sup>63</sup> He added that he was never accused of misconduct.<sup>64</sup>

## 2

### **Testimony of Ms. Ashlie**

At this juncture the employer’s witness, Ms. Rea Ashlie, its Human Resources Representative, testified.<sup>65</sup> She stated that on December 20, 2013 she and the Claimant’s supervisor were preparing to meet with Juan to discuss his progressive discipline, with the probable result of a termination, when the

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<sup>59</sup> Referee Hearing Transcript, at 10-11.

<sup>60</sup> Referee Hearing Transcript, at 11.

<sup>61</sup> Id.

<sup>62</sup> Referee Hearing Transcript, at 12-13.

<sup>63</sup> Referee Hearing Transcript, at 13.

<sup>64</sup> Id.

<sup>65</sup> Referee Hearing Transcript, at 14.

union representative asked them to consider a last-chance agreement.<sup>66</sup> She testified the concept was discussed<sup>67</sup> and that Claimant agreed to accept it.<sup>68</sup> But although his choice was to accept the last-chance agreement or be fired, Ms. Ashlie insisted that Mr. Rosales was never told at the meeting that he was fired.<sup>69</sup>

As a result, on Monday she was surprised to be told that Mr. Rosales was a no-call, no-show; but shortly thereafter, she received a phone call from the union informing her that Mr. Rosales had accepted the termination.<sup>70</sup> And she was asked to issue a termination letter.<sup>71</sup> But she objected, saying that there was

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<sup>66</sup> Referee Hearing Transcript, at 14.

<sup>67</sup> Pursuant to the last-chance agreement, he would meet with his manager on a weekly basis. Referee Hearing Transcript, at 15. Later in her testimony, Ms. Ashlie agreed that the agreement would make Claimant an “at-will” employee, stripped of his rights under the collective bargaining agreement to fight a discharge. Referee Hearing Transcript, at 22-23.

<sup>68</sup> Referee Hearing Transcript, at 15, 20-21. Accordingly, he was relieved of neither his badge nor his keys, as he would have been had he been discharged. Referee Hearing Transcript, at 17.

<sup>69</sup> Referee Hearing Transcript, at 16, 19-20, 22. Answering a question by Claimant’s counsel, Ms. Ashlie conceded that the termination letter she signed regarding Mr. Rosales used the phraseology — “you chose termination in lieu of accepting a last-chance agreement.” Referee Hearing Transcript, at 22.

<sup>70</sup> Referee Hearing Transcript, at 18.

<sup>71</sup> Referee Hearing Transcript, at 25.

no termination for him to accept, since he had accepted a last-chance agreement.<sup>72</sup> And so, instead of drafting the last-chance agreement for Claimant to sign, as she expected to do, she wrote-up the termination letter, characterizing his separation as a quit.<sup>73</sup> Ms. Ashlie made it clear that the basis for Mr. Rosales' dismissal were performance issues, not misconduct.<sup>74</sup>

While Ms. Ashlie stated that she considered Mr. Rosales to have quit because he did not report on Monday, she agreed with Referee Howarth that — had he not declined the last-chance agreement on Friday — his absence on Monday would not have been regarded as a voluntary quit.<sup>75</sup>

## **B**

### **Discussion**

In the instant case, the Board of Review (adopting the decision of the Referee as its own)<sup>76</sup> found that Claimant Rosales, facing an imminent

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<sup>72</sup> Referee Hearing Transcript, at 18, 25-26.

<sup>73</sup> Referee Hearing Transcript, at 18, 26.

<sup>74</sup> Referee Hearing Transcript, at 17.

<sup>75</sup> Referee Hearing Transcript, at 24-25.

<sup>76</sup> As we were establishing the travel of the case, it was necessary to distinguish between the decision of the Referee and the decision of the Board affirming it. Henceforth, however, our references to the decision of the Board shall allude to the decision authored by Referee Howarth that was adopted by the Board as its own. But, we shall still cite to the “Decision of the Referee.”

discharge, quit his position at Rhode Island Hospital without good cause; and, was thereby disqualified from receiving unemployment benefits pursuant to § 28-44-17 of Employment Security Act. The uncontested facts are that the Hospital was simply going to fire him for poor performance;<sup>77</sup> but, at the suggestion of a union official, management gave Mr. Rosales a choice — (A) be terminated for poor performance or (B) sign a last-chance agreement under which he would maintain his position but forfeit his rights under the collective bargaining agreement to fight a future discharge. There is no dispute that he chose the latter. But there is a fundamental dispute among the parties regarding the meaning that should be given this choice.

Now, unemployment appeals regarding § 17 disqualifications are probably the second most numerous that this Court hears (after appeals involving allegations of misconduct, under § 28-44-18). But usually, the preliminary questions of whether the Claimant quit and why the Claimant quit are not in dispute. Instead, the parties generally join issue regarding whether the claimant's reason for resigning constituted good cause.

But in this case these foundational questions are contested. Mr. Rosales

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<sup>77</sup> It is worth noting that had he been terminated for poor performance at that moment, Claimant's eligibility for unemployment benefits would have been indisputable.

urges he was fired; the Department, the Board of Review<sup>78</sup> and the Hospital all assert that he quit. And so, we shall follow the following plan of action —

First, we ask — Is the Board of Review’s finding that Mr. Rosales quit is supported by competent evidence of record. If it is not, we may end our inquiry (for § 17 is inapplicable). But if it is, we must ask the second question — Did he quit voluntarily? Again, if he did not, we may end our inquiry. But if the evidence shows he did we must ask the third and final question — Did he quit for good cause?

## 1

### **The Separation — A Firing or a Quitting**

The Board of Review<sup>79</sup> found, (in what might charitably be called “cursory” fashion) that Claimant voluntarily quit his employment at Rhode Island Hospital. Of course, our role is not to evaluate the factual determinations of the Board de novo, but merely to decide whether the Board’s findings are “[c]learly erroneous in view of the reliable, probative, and

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<sup>78</sup> Although noticed, the Department has not chosen to become an active party in this appeal; the Board, though represented before this Court, has relied upon the memorandum submitted by the employer. Nevertheless, the positions of the Board and the Department may be gleaned from the decisions each has issued in this case.

<sup>79</sup> Again, when we refer to the decision of the Board of Review we are referring to Referee Howarth’s March 17, 2014 decision that was adopted by

substantial evidence on the whole record.”<sup>80</sup>

a

### **The Findings of the Board of Review on the Nature of the Claimant’s Discharge**

Lamentably, there is a deficiency in the decision that the Board of Review adopted (and issued) in this case: it failed to address the pivotal issue of the nature of the Claimant’s separation from Rhode Island Hospital — Did he quit or was he fired? For example, in its Findings of Fact, the Board stated that “[t]he employer considered that the claimant had voluntarily quit his job[;]” (Emphasis added);<sup>81</sup> but, the Board never made a finding regarding its own conclusion as to whether Claimant quit or was fired. The Board does not properly discharge its duties when it merely states what the employer believed.

This omission was repeated in the “Conclusions” section of the Board’s decision, which was entirely dedicated to the question of whether the Claimant had good cause to quit; no findings were made regarding whether (1) the Claimant quit or was fired — a central issue in the case — and (2) the

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the Board as its own. However, citations will be to that document.

<sup>80</sup> See Gen. Laws 1956 § 42-35-15(g)(5).

<sup>81</sup> See Decision of Referee, March 17, 2014, at 1 quoted ante, at 3.

subsidiary issue (assuming he quit), of whether he did so voluntarily.<sup>82</sup> As a result, we can only guess at the reason that the Board believed Claimant quit — Was it his refusal to sign the last-chance agreement? Was it the fact that he did not report for work on Monday? Was it the fact that he did not call-in personally to report his decision? We simply do not know.

And so, we would be fully justified in remanding the case to the Board of Review for the making of specific findings on this point; or, we can press on and review the record ourselves, to see if the law requires an outcome. In the interests of expediting justice I shall take the latter course, armed with the knowledge that there are few disputed facts in this case.<sup>83</sup>

**b**

**The View of the Claimant — A Firing**

In his Memorandum of Law, Appellant Rosales urges that the Board of Review made a “blatant error of law” when it found that he voluntarily left his job.<sup>84</sup> Claimant argues — assumes really, in light of the omissions in the

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<sup>82</sup> See Decision of Referee, March 17, 2014, at 2 quoted ante, at 3-4.

<sup>83</sup> The parties do disagree on one point — management testified Claimant agreed to the last-chance agreement at the meeting; Claimant Robles denied it. As we shall see, I do not consider this question dispositive.

<sup>84</sup> See Part IV-1-a of this opinion, ante.

Board’s findings described above<sup>85</sup> — that it was his refusal to execute the last-chance agreement that was the basis of the finding of a quit.<sup>86</sup> Acknowledging that this Court (nor our Supreme Court) has previously considered whether refusing to execute a last-chance agreement (as an alternative to termination) can disqualify a Claimant from receiving unemployment benefits, he cites two intermediate appellate court cases — from Colorado and Massachusetts — that reject the proposition that a refusal to sign such an agreement may support a finding of a voluntary quitting.<sup>87</sup>

c

**The View of the Employer — A Quitting**

Rhode Island Hospital begins its argument on this issue by making a factual point — that the Claimant agreed to the last chance agreement at the meeting on Friday.<sup>88</sup> It cites the Board of Review’s finding to this effect.<sup>89</sup> And

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<sup>85</sup> See Claimant Rosales’ Memorandum in Support, at 9.

<sup>86</sup> See Claimant Rosales’ Memorandum in Support, at 9.

<sup>87</sup> See Claimant Rosales’ Memorandum in Support, at 9-13 citing Bell v. Industrial Claim Appeals Office, 93 P.3d 584 (Colo. App. 2004) and Pulde v. Director of the Division of Unemployment Assistance, 84 Mass. App. 1122, 998 N.E. 2d 375 (Mass. App. 2013). We shall defer discussion of these cases to Part IV-B-2 of this opinion, since they turn more on the issue of the voluntariness of the quit than the issue of whether the Claimant quit or was fired.

<sup>88</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4.

in support of its belief that Claimant had not been fired as of Friday, it cites the fact that Claimant had not been relieved of his keys and badge.<sup>90</sup> And so, it argues, that as of Friday afternoon, Claimant had not been fired, which is certainly unassailable.<sup>91</sup> Next, and in a similar vein, the Employer argues that an employee cannot decide (unilaterally) to “take” a termination.<sup>92</sup> Finally, the Hospital invokes, without naming it, the doctrine of “constructive quitting” for the principle that an employee need not expressly resign in order to fall within the ambit of § 17.<sup>93</sup>

**d**

**The Nature of the Termination — Resolution of Fact and Law**

Now, in my view the foregoing facts lead us to one ineluctable conclusion — that Claimant did not quit, but was fired. And I believe the Board’s (implicit) finding to the contrary is clearly erroneous.

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<sup>89</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4 citing Decision of Referee, at 1.

<sup>90</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4 citing Referee Hearing Transcript, at 17.

<sup>91</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4.

<sup>92</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4-6.

<sup>93</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4-6.

### **Evaluation — Quitting Based on the Refusal to Sign**

To begin, it is undisputed that the idea that Mr. Rosales would be separated from the Hospital originated with the employer. There is no evidence that Claimant harbored any feelings that, for any reason, it was time for him to move on. On a certain day management intended to fire Mr. Rosales, but later agreed to grant him the opportunity to stay, if and only if, he signed a last-chance agreement. And, as we know, he later declined that opportunity.

The Hospital argues that he chose to quit. But, Mr. Rosales never expressed or implied any desire to leave the Hospital's employ; he never submitted a letter of resignation. If he verbalized anything that management claimed to have taken as a desire to quit, he was simply responding to the offer they tendered (acknowledging that he understood the consequences of his decision). Quite frankly, it is just plain difficult to fathom why a Hospital employee with twenty-two years' service would blithely walk away from his career.<sup>94</sup>

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<sup>94</sup> See Cogean v. Department of Employment and Training, Board of Review, 658 A.2d 528, 530 (R.I. 1995)(Court reversed District Court's affirmance of Board of Review decision finding Claimant had quit by walking-off job after dispute about when she could take her personal medications — "We find it totally incredible that an employee with twenty-four years of service would

The Hospital makes much of the fact that Claimant was not fired on Friday, which is very true. But what effect does this fact have on the outcome of this case? The Hospital has not denied (in testimony or in its Memorandum) that Claimant was given a choice — sign the last-chance agreement or be fired.

And this ultimatum was never withdrawn. There is no testimony in this record that Ms. Ashlie, when informed on Monday morning by a union representative<sup>95</sup> that Claimant would not sign the last-chance agreement, ever withdrew management’s ultimatum — i.e., the threat of termination.<sup>96</sup> Nor did

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have voluntarily left her job in the circumstances described in the record of this case.”).

<sup>95</sup> In its Memorandum the Employer refers to the Claimant’s failure to report to work or call-in on Monday. See Rhode Island Hospital’s Memorandum in Opposition, at 4 citing Referee Hearing Transcript, at 18. In my view, it was close to disingenuity for the Employer to raise the specter of Claimant being a “no-call, no-show” without referencing contemporaneously the notice provided by the union representative.

<sup>96</sup> Her sole objection was that it was too late; he had already agreed to sign it. Referee Hearing Transcript, at 18, 25-26. But, life is not chess, where a player cannot rescind a move after having removed his or her hand from the piece. See World Chess Federation (FIDE) Rules of Play 4.7, available at <http://www.fide.com/fide/handbook.html?id=171&view=article>. And a written agreement was clearly anticipated.

In most scenarios in life one can revise or withdraw an oral agreement, at least until certain formalities have been undertaken or before the other party suffers prejudice. And, as implied in the text, I see no reason why management could not have withdrawn the ultimatum; or, for that matter, withdrawn the last-chance agreement demand prior to execution.

her letter “confirming” his termination contain any offer for him to return to work without signing the last-chance agreement.<sup>97</sup> As far as the record shows, from Friday to Monday Mr. Rosales’ option was the same — stay on under the last chance agreement or be fired.

ii

**Evaluation — Quitting Based on “Taking” the Termination**

The Hospital bases its assertion that Claimant quit upon the fact (from Ms. Ashlie’s uncontradicted testimony) that when the union representative called her on Monday she said Mr. Rosales will “take” the termination — the employer argues this signifies that Mr. Rosales was resigning.<sup>98</sup> This is, in my view, pure flummery. Whatever Claimant did or did not do, he did not act unilaterally or presumptuously; he was responding to the Hospital’s offer.

And the Hospital was not “moving toward”<sup>99</sup> a termination of Mr. Rosales — they told him they had arrived there. If he “took” a termination, it is because that is what was offered by this Employer — that or agreeing to a last-

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<sup>97</sup> See Letter from Rea K. Ashlie to Juan Rosales dated December 23, 2013, Employer’s Exhibit No. 1.

<sup>98</sup> Whether or not the employer is overestimating the weight that ought to be given to the word “take,” we have to remember that Claimant didn’t utter it, his union representative did.

<sup>99</sup> See Rhode Island Hospital’s Memorandum in Opposition, at 4.

chance agreement, which he would not do. To reiterate, the employer did not withdraw the threat of termination (for poor performance) on Monday morning, which it could have done. Would the Employer's argument be materially different if the union representative had simply told Ms. Ashlie that Claimant would not sign the agreement?

As far as I can see, Mr. Rosales had a choice: pick door number one, termination, or door number two, sign the agreement. There was no door number three.

iii

**Evaluation — Quitting Based on “Constructive Quitting”**

In its Memorandum, the Hospital invokes (by citing a decision of this court which applied the theory<sup>100</sup>) the doctrine of the constructive quit, which has been explained ante, in Part II-D of this opinion. Notwithstanding the length of the discussion ante, I believe we must find this doctrine to be not applicable to the instant case; it simply does not fit into that concept.

Quite simply, Mr. Rosales did not do (or fail to do) anything that precluded the Hospital from retaining his services. He was not unavailable due

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<sup>100</sup> Jaiyeola v. Department of Labor and Training, Board of Review, A.A. No. 12-124 (Dist. Ct. 09/27/2012), cited in Appellee's Memorandum in Opposition, at 5-6.

to incarceration;<sup>101</sup> he did not go AWOL or otherwise stop reporting for work without explanation.<sup>102</sup> And to the extent the Employer wishes to press the factually baseless argument that Claimant was a “no call, no show” on Monday, I believe this would be an inappropriate use of the doctrine, impinging on the domain of § 18. As this Court recently stated, after Jaiyeola :

When the Board finds a constructive quitting we are inferring that the worker has abandoned her job; in such cases we must glean from the facts and circumstances an unexpressed desire on the part of the claimant to terminate her position. Where we cannot divine such an intention, the claimant’s absenteeism must be analyzed for misconduct under section 18.<sup>103</sup>

For the reasons stated above, I find that no such intent (i.e., to abandon his job) is ascribable to Mr. Rosales in the instant case.

iv

**Resolution of the Question of the Termination**

Now, since we have found Claimant did not quit, we could declare Mr. Rosales eligible for benefits under § 17.<sup>104</sup> But, in the interests of providing this

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<sup>101</sup> See cases cited ante at 16, n. 40.

<sup>102</sup> See cases cited ante at 16, nn. 41.

<sup>103</sup> See Belanger v. Department of Labor and Training, Board of Review, A.A. No. 12 – 241, slip op. at 12 (Dist.Ct 02/18/2013).

<sup>104</sup> Our finding that Claimant was fired would ordinarily necessitate an inquiry regarding whether or not he committed misconduct. But, since there is no allegation of misconduct, we need not remand this case for the making of

Court with the most comprehensive Findings and Recommendations possible, I shall proceed and, assuming arguendo that Claimant quit, discuss our second question — If Claimant quit, did he do so voluntarily?

2

**The Voluntariness of the Separation**

We will now consider the issue of voluntariness — which is not tautological to the concept of the quitting itself. While most quits are unquestionably voluntary, one can also quit involuntarily. Before commencing, we should note that this task will be made more difficult than it ought to have been because the Board of Review also neglected to make findings on this issue. Nevertheless, we shall endeavor to resolve this issue as well.

a

**The Employer's Basis for Action**

Earlier, we described how, in the Kane case, our Supreme Court extended the doctrine of forced retirement from its core (i.e., allowing for benefits to persons about to be fired for poor performance), to encompass instances where the Claimant was about to be terminated for misconduct. And so, in the instant case we apply the core rule, not the expanded one; the record in this case is clear — Mr. Rosales was facing discharge for poor

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findings on that issue.

performance.<sup>105</sup> He was given a choice of either submitting to a last-chance agreement or being fired; given the implications of the last-chance agreement (especially his inability to fight any discharge while subject to it), he decided his best interests lay in accepting the termination, and fighting it through the grievance system. But this was not by any means a free choice on his part.<sup>106</sup> At the end of the day, what the Supreme Court stated in reference to Ms. Kane applies here with regard to Mr. Rosales — “[i]f the matter were up to [him], [he] would still be employed.”<sup>107</sup>

Now, let us apply the teaching of Kane to the instant case. As we know, the Court found Ms. Kane’s resignation to be involuntary because it was made in lieu of being terminated for misconduct. But here, Mr. Rosales’ option (as it was amended) was to work under a last-chance agreement without bargaining-

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<sup>105</sup> It is worth noting that had Claimant been terminated then for poor performance, his eligibility for benefits would have been indisputable.

While the record is rather limited in defining the nature of Claimant’s poor performance, we may note that, it is generally difficult for employees to remedy true poor performance — because employees who are performing poorly are usually unable to do better. If they were able to do better but made errors intentionally, they would be guilty of misconduct. So, in the case of those facing discharge for poor performance, the opportunity to avoid termination by executing a last chance agreement may be akin to being a drowning man who is thrown an anchor instead of a life preserver.

<sup>106</sup> See Kane, *id.*, citing Green, *ante*, 728 P.2d at 998.

<sup>107</sup> See Kane, *id.*, citing Perkins, *ante*, 234 Neb. At 362, 451 N.W.2d at 93.

agreement protections, based on poor performance. Obviously, the nature of the threat and the nature of the grounds differ between the two scenarios.

**b**

**The Nature of the Employer's Threat**

The threat of reduction in status (surrendering rights to oppose discharge) would appear less ominous (at least in the short run) than immediate termination. So, would Claimant's separation be considered involuntary? We have no Rhode Island case law on point.

Attempting to fill this void, Appellant proffers two sister state appellate cases which are, in my view, on point, and which may be considered for their persuasive authority — Bell v. Industrial Claim Appeals Office (Colo. App. 2004)<sup>108</sup> and Pulde v. Director of the Division of Unemployment Assistance (Mass.App. 2013).<sup>109</sup> We shall begin with the case from the Commonwealth.

**i**

**The Foreign Cases**

In Pulde the Massachusetts Court of Appeals considered an appeal from its District Court upholding a decision of its Board of Review that upheld the

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<sup>108</sup> See 93 P.3d 584 (Colo. App. 2004).

<sup>109</sup> See 84 Mass. App. 1122, 998 N.E. 2d 375, 2013 WL 6169138 (Mass. App. 2013)(Unpublished Disposition).

denial of unemployment benefits to Ms. Pulde because she left work voluntarily, without good cause.<sup>110</sup> Ms. Pulde was a nurse at Mercy Hospital who, during her shift on July 27, 2010, was found to have blood-alcohol readings of .057 and .050.<sup>111</sup> She was cleared to return to work on August 5, 2010, but the employer would not allow her to return to work unless she signed a “Conditional Reinstatement Agreement” under which Ms. Pulde would become an at-will employee; she would also promise to maintain fitness for duty.<sup>112</sup> Although Ms. Pulde’s union representative requested the agreement to be amended to remove, *inter alia*, the at-will clause, management refused; in response, Ms. Pulde refused to sign the agreement and was dismissed.<sup>113</sup>

After being denied benefits by the Department of Unemployment Assistance, a hearing was held before a “review examiner” who held that by refusing to sign the Agreement, Ms. Pulde initiated her separation “by refus[ing] to agree to the terms presented by the employer.”<sup>114</sup> This decision

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<sup>110</sup> See Pulde, at \*1.

<sup>111</sup> See Pulde, at \*1.

<sup>112</sup> See Pulde, at \*1.

<sup>113</sup> See Pulde, at \*1.

<sup>114</sup> See Pulde, at \*1, *citing* Chapter 151A, § 25(e)(1). The Referee found Ms. Pulde did not demonstrate good cause for her separation, or that it was “urgent, compelling, or necessitous.” Pulde, at \*1, n. 5.

was affirmed by the Board of Review and a judge of the District Court.<sup>115</sup>

Before the Court of Appeals, Ms. Pulde argued that she did not resign, but was discharged, and her eligibility should be adjudicated under the provision regarding misconduct.<sup>116</sup>

The Court of Appeals reversed, holding that, as a matter of law, she did not quit her job.<sup>117</sup> The Court held that —

... the determination that Pulde voluntarily quit her job is wrong as a matter of law. It was undisputed that she was terminated when she refused to sign the conditional reinstatement agreement because of a concern about what it would do to her rights under the CBA. Although, strictly speaking, it was within her power to keep her job (by signing the conditional reinstatement agreement), that option did not transform the hospital's termination of her employment into a voluntary act on her part. Prior to her supervisor's smelling alcohol on her breath, Pulde was working under a particular contractual arrangement, and her refusal to alter those contractual terms does not mean she left voluntarily. In simple terms, the hospital fired her from a job she wanted to keep. Contrast Connolly v. Director of the Division of Unemployment Assistance, 460 Mass. 24, 29, 948 N.E.2d 1218 (2011)(no unemployment benefits where employee, unhappy with her job, accepted employer's separation agreement).<sup>118</sup>

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<sup>115</sup> See Pulde, at \*1, citing Chapter 151A, § 25(e)(2).

<sup>116</sup> See Pulde, at \*1.

<sup>117</sup> See Pulde, at \*2.

<sup>118</sup> See Pulde, at \*2. It is not lost upon me that the last phrase of the excerpt — “... the hospital fired her from a job she wanted to keep” — would tend to indicate that the Court's decision did not hinge on its finding that Ms. Pulde's resignation was involuntary, but on a finding that she was fired. But in other instances in the same excerpt the involuntariness of her departure

The Appeals Court, noting the Agreement’s potential effect on her status, and that it was being presented to her as a “sign this or else ultimatum,” held that “... the hospital’s decision to terminate her when she refused to sign the agreement cannot accurately or fairly be characterized as a decision on her part to leave voluntarily.”<sup>119</sup> And so, the Court set aside the decision disqualifying Ms. Pulde for leaving without good cause and, not forgetting the conduct by which she precipitated the controversy, remanded the case to the Department for findings to be made on the issue of misconduct.<sup>120</sup>

The Pulde case is remarkably similar to the case before us, except that Mr. Rosales did not reject the agreement immediately but came to that conclusion over the weekend. Beyond that, it seems to line-up perfectly. The Colorado case, although factually similar, is legally distinguishable.

The Claimant in Bell v. Industrial Claim Appeals Office (Colo. App. 2004),<sup>121</sup> Ms. Renita D. Bell, was an employee of the Regional Transportation

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was declared. And so, not wishing to overstate the Court’s holding, I have not cited it for the broader proposition, but only regarding voluntariness.

<sup>119</sup> See Pulde, at \*2.

<sup>120</sup> See Pulde, at \*3.

<sup>121</sup> 93 P.3d 584 (Colo. App. 2004).

District who was discharged for insubordination.<sup>122</sup> The facts of the case are not given, except as they may be inferred from the findings of the hearing officer — Claimant was given a 5-day suspension for legitimate concerns regarding her job performance; as a result, the employer requested Claimant to execute, as a precondition to her return to work, a “performance contract and last chance agreement,” by which she would promise to complete her work satisfactorily, in a timely manner, and with confidentiality and integrity.<sup>123</sup>

Ms. Bell was discharged for refusing to sign the agreement and refusing to return to work.<sup>124</sup> And based on these findings the hearing officer found Ms. Bell disqualified from the receipt of unemployment benefits due to misconduct — specifically, refusing to return to work and refusing to sign the agreement.<sup>125</sup> Upon review, Colorado’s unemployment Appeals Panel affirmed; after which, appeal was taken to the Appeals Court.<sup>126</sup>

The Appeals Court began its analysis by refusing (in just three sentences) to disturb the hearing officer’s finding that her employer had “genuine and

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<sup>122</sup> See Bell, 93 P.3d at 585.

<sup>123</sup> See Bell, 93 P.3d at 585.

<sup>124</sup> See Bell, 93 P.3d at 585.

<sup>125</sup> See Bell, 93 P.3d at 585.

<sup>126</sup> See Bell, 93 P.3d at 585.

valid concerns” about Ms. Bell’s job performance, finding it to be supported by substantial evidence in the record.<sup>127</sup>

Next, the Court addressed the dominant legal issue in the case — whether the Panel erred by finding Claimant Bell had committed misconduct by refusing to sign the last chance agreement; the Appeals Court found it was error.<sup>128</sup> The Court, employing what it called an “objective standard,” found, from the undisputed facts and established findings of material fact, that the agreement was one which a reasonable person would have refused — based on the provisions within it by which Claimant would waive “significant legal protections and rights.”<sup>129</sup> The Court found that refusing the agreement was a reasonable option because “... it keeps intact all available employee protections regarding a present employment dispute and preserves all potential causes of action against the employer and its agents.”<sup>130</sup> Thus, refusing it could not constitute insubordination and could support a finding of misconduct.<sup>131</sup>

Finally, the Appeals Court held that Claimant’s refusal to return to work

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<sup>127</sup> See Bell, 93 P.3d at 585.

<sup>128</sup> See Bell, 93 P.3d at 585-87.

<sup>129</sup> See Bell, 93 P.3d at 585-86.

<sup>130</sup> See Bell, 93 P.3d at 586.

<sup>131</sup> See Bell, 93 P.3d at 586-87. In this context, the Court noted that Claimant

was also not a basis for disqualification; the Court noted that the hearing officer's findings did not treat this issue as being separate from the last chance agreement issue; moreover, "... the claimant testified that she did not return to work because she was led to believe that she would be terminated unless she signed the agreement, which she was unwilling to do."<sup>132</sup>

And so, the matter was remanded for consideration of allegations of misconduct perpetrated previous to the controversy regarding the last chance agreement.<sup>133</sup>

## ii

### **The Cogean Case**

The factual circumstances of this case bring to mind our Supreme Court's opinion in Cogean v. Department of Employment and Training Board of Review (R.I. 1995),<sup>134</sup> in which the Court considered whether a Board of Review decision (affirmed by the District Court) finding that a long-time nursing home employee with diabetes quit when her supervisor directed her to

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was under no obligation to resolve the dispute with her employer. Id.

<sup>132</sup> See Bell, 93 P.3d at 587.

<sup>133</sup> See Bell, 93 P.3d at 587.

<sup>134</sup> See Cogean v. Department of Employment and Training Board of Review, 658 A.2d 528 (R.I. 1995).

pass out the residents' medications before she took her own.<sup>135</sup> Reversing the Board's findings, the Court commented —

We find it totally incredible that an employee with twenty-four years of service would have voluntarily left her job in the circumstances described in the record of this case.<sup>136</sup>

And so, the Court held that Ms. Cogean was discharged.<sup>137</sup>

**c**

**Resolution of the Issue of Voluntariness**

The Claimant herein, Mr. Rosales, was a 22-year employee of the Hospital. While the circumstances of the instant case may differ from those in Cogean, the notion that employees with decades of service tend not to resign voluntarily is a truth that applies with full vigor. The idea that Mr. Rosales' separation from the hospital was voluntary is simply off-putting. And, all in all, I find the reasoning seen in the Pulde and Bell cases to be logical and persuasive. For these reasons, I find the Board of Review's decision that Mr. Rosales voluntarily left his employment with Rhode Island Hospital is clearly erroneous.

Consequently, we must consider, following the example our Supreme

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<sup>135</sup> See Cogean, 658 A.2d at 529-30.

<sup>136</sup> See Cogean, 658 A.2d at 530.

<sup>137</sup> See Cogean, 658 A.2d at 530.

Court established in Kane, whether Claimant Rosales is subject to disqualification for proved misconduct. As recited above, the employer specifically disavowed any allegation of misconduct.<sup>138</sup> Therefore, I see no need to remand the instant matter to the Board of Review for it to make a determination regarding whether Mr. Rosales had committed misconduct in the employ of the Hospital. This Court may therefore enter judgment for Claimant Rosales.

### 3

#### **Good Cause**

The Board, adopting the Conclusions of the Referee, found that Claimant had a reasonable alternative to separation, signing the last chance agreement. Again, it should be noted that the Board did not comment on the issue of good cause or the rights that claimant was being asked to give up. It seems that the Board simply assumed that the Claimant's reservations were insignificant.

We do not have any Rhode Island cases discussing whether refusing to sign a last-chance agreement is a good cause to quit. Appellant points to a recent unemployment decision of this Court arising out of a strike scenario

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<sup>138</sup> Ante at 12, citing Referee Hearing Transcript, at 17.

issued by this Court: Verizon New England v. Department of Labor and Training, Board of Review (2014),<sup>139</sup> for the proposition that the claimants were locked out when the employer offered the opportunity to return to work if (and only if) they waived certain grievance and arbitration rights they had enjoyed under the prior (expired) collective bargaining agreement.<sup>140</sup>

4

**Resolution**

In my view, Mr. Rosales' refusal to waive his contractual rights is based on good cause — indeed, it arises from a private right vested in him by contract. Accordingly, it is perfectly proper for him to refuse to relinquish that right. While his refusal to sign the last-chance agreement may be questioned on strategic grounds, it was certainly proper. And so, I conclude that the decision of the Board of Review holding that Mr. Rosales voluntarily left the employ of Rhode Island Hospital without good cause is clearly erroneous. I shall therefore recommend that it be set aside.

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<sup>139</sup> See Verizon New England v. Department of Labor and Training, Board of Review, A.A. No. 12-131, (Dist.Ct. 01/10/2014)(Jabour, J.).

<sup>140</sup> See Appellant's Memorandum, at 12. And see Verizon, ante n. 139, slip op. at 10-11.

V  
**MISCONDUCT**

To reiterate, if the Board of Review's § 17 decision is set aside, the question of whether Mr. Rosales should be disqualified for misconduct arises.<sup>141</sup> In the first instance, this issue must be decided by the Board of Review (or one of its designee Referees). And so, normally, we would remand the case to the Board for that purpose.

But, in this case, we need not do so. The Hospital's representative at the hearing made it clear that there was no allegation that Mr. Rosales committed, or was being fired for, misconduct. And there is no allegation that Claimant committed misconduct by refusing to sign the last chance agreement.<sup>142</sup> As a result, if these Findings and Recommendations are accepted by the Court, we may enter judgment in Claimant's favor without further delay.

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<sup>141</sup> See Kane, 592 A.2d at 139-40, discussed ante at 8-11, 36-37.

<sup>142</sup> There are cases which have addressed this issue, with the general view being that refusing to sign such an agreement is not misconduct. See PPL Electric Utilities Corporation v. Unemployment Compensation Board of Review, 2014 WL 4463014, \*4 (Pa.Cmwlth. 2014); Kentucky Unemployment Insurance Commission v. Cecil, 381 S.W.3d 238, 246 (Ky. 2012); Williamson v. Virginia Employment Commission, 56 Va.App. 14, 24-26, 690 S.E.2d 304, 309-10 (2010).

**VI**  
**CONCLUSION**

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. Under this standard, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.<sup>143</sup> Upon careful review of the evidence, I conclude that the Board's decision disqualifying Mr. Rosales from receiving unemployment because he quit without good cause is clearly erroneous in view of the reliable, probative, and substantial evidence of record — and the applicable law.<sup>144</sup> I therefore recommend that the Decision of the Board of Review rendered in this case be REVERSED.

\_\_\_\_\_/s/\_\_\_\_\_  
Joseph P. Ippolito  
Magistrate  
MAY 29, 2015

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<sup>143</sup> Cahoone, 104 R.I. at 506, 246 A.2d at 215. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). Also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986) and Gen. Laws 1956 § 42-35-15(g), ante at 18. And, Guarino, ante at 18, n. 43.

<sup>144</sup> Gen. Laws 1956 § 42-35-15(g)(3),(4).

