STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Lawrence Solitro	:	
	:	
v.	:	**A.A. No. 2015 - 016**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

This matter is before the Court pursuant to § 8-8-8.1 of the General Laws for review of the Findings & Recommendations of the Magistrate.

After a de novo review of the record and the memoranda of counsel, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto.

It is, therefore, ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is hereby AFFIRMED on the issue of eligibility but REVERSED as to the order of repayment.

Entered as an Order of this Court at Providence on this 16th day of October, 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

Lawrence Solitro	:	
	:	
v.	:	**A.A. No. 15 – 016**
	:	
Department of Labor and Training,	:	
Board of Review	:	

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 Mr. Lawrence Solitro 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 Venda Ravioli, a Providence food store, 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.

In this case, the Board of Review found that Mr. Solitro abandoned his position at Venda Ravioli by failing to report to work for one week and neglecting to call-in to explain his absence. The Board concluded that this behavior constituted a leaving without good cause, which disqualified him from receiving unemployment benefits, pursuant to Gen. Laws 1956 § 28-44-17. Based on my review of the record certified to this Court by the Board of Review, I have concluded that Mr. Solitro should be disqualified from receiving unemployment benefits; not because he left the employ of Venda Ravioli without good cause, but because his actions — as found by the Board — constituted disqualifying misconduct as defined in Gen. Laws 1956 § 28-44-18. And so, at the end of the day, I am recommending that the outcome below be affirmed, albeit on a different rationale.

I

FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Mr. Lawrence J. Solitro was employed for seven months as a meat cutter by Venda Ravioli until his last day of work, November 23, 2013. He filed a claim for unemployment benefits on December 19, 2013 and began to receive benefits; then, nine months later, on September 25, 2014, a designee of the Director of the Department of Labor and Training ruled that Mr. Solitro was ineligible to receive benefits — finding that he had left his position

without good cause within the meaning of Gen. Laws 1956 § 28-44-17, by failing to report for work and failing to call-in to explain his absence.[1] The Director also ordered Mr. Solitro to repay benefits he had received in the amount of $13,650.00.[2]

Claimant filed an appeal from the Director's decision, and on December 11, 2014, Referee Nancy L. Howarth conducted a hearing on the matter. Mr. Solitro appeared and testified, as did two representatives of Venda Ravioli: Mr. Alan Costantino, its owner, and Mr. Michael McLynch, its Manager. Seven days later, Referee Howarth affirmed the Director's decision. The Referee's decision had four elements — first, she allowed Mr. Solitro to re-open his claim under Rule 13 of the Board of Review Rules of Procedure even though he had failed to appear at a previously scheduled hearing; second, Ms. Howarth found that Mr. Solitro had good cause to file a late appeal within the meaning of § 28-44-39(b); third, the Referee decided that Mr. Solitro had abandoned his job at Venda Ravioli, thereby quitting; and that he had done so without good cause as defined in § 28-44-17; and fourth, Referee Howarth decided that Claimant Solitro should be required to repay the unemployment benefits that he had previously received.[3] Since the first and second findings have not been challenged by any party-in-interest, we shall address only the third and fourth

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1 See Decision of Director, September 25, 2014, at 1.

2 Id.

parts of Referee Howarth's opinion.[4]

Regarding the eligibility issue, Referee Howarth made the following findings of fact:

> The claimant was employed as a meat cutter by the employer. He was scheduled to work on November 24, 2013. The claimant was experiencing medical issues and was advised by his doctor not to stand for long periods of time, which his work required. The claimant did not report to work from from November 25, 2013 through November 28, 2013. He did not contact the employer to notify them of the reason for his absence or to request a medical leave. The employer attempted to call the claimant numerous times, with no response. The claimant came to the employer's place of business on November 29, 2013 to get his paycheck. The employer informed the claimant that he was considered to have voluntarily quit his job.[5]

Which led her to make the following conclusions:

> * * *
> The burden of proof in establishing good cause for leaving rests solely with the claimant. In the instant case, the claimant has not sustained this burden. The evidence and testimony presented at the hearing establish that the claimant stopped reporting to work and failed to notify the employer for the reason for his absence, or to request a medical leave. Therefore, I must find the claimant abandoned his job and that his leaving is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.[6]

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3 See Decision of Referee, December 11, 2014, passim.

4 We shall defer discussion of the fourth element, repayment, until after we determine whether Claimant's disqualification was erroneous. See Part V of this opinion, post, at 29.

5 See Decision of Referee, December 11, 2014, at 2.

6 See Decision of Referee, December 11, 2014, at 3.

In sum, Referee Howarth found that Mr. Solitro had abandoned his position (or quit constructively), by failing to inform his employer as to why he had not reported for work; accordingly, Referee Howarth affirmed the Director's decision denying benefits to Mr. Solitro.[7]

Claimant filed a timely appeal and, on January 30, 2015, the matter was decided by the Board of Review on the basis of the record certified to it.[8] 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.[9]

On March 2, 2015, Mr. Solitro filed a complaint for judicial review in the Sixth Division District Court.

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7 See Decision of Referee, December 11, 2014, at 2.

8 This procedure is authorized by Gen. Laws 1956 § 28-44-47.

9 See Decision of Board of Review, January 30, 2015, at 1.

II

APPLICABLE LAW

A

LEAVING FOR GOOD CAUSE — THE STATUTE

The resolution of this case involves the application of the following provision of the Rhode Island Employment Security Act, which specifically touches on the issue of 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.

Based on the language of the above statute, eligibility for unemployment benefits under § 17 has three conditions — first, that the claimant left his or her prior employment; second, that the resignation was voluntary; and third, that the claimant left the position for good cause as defined in § 17 (this last is the most frequently litigated element of § 17).

And so, we shall now proceed to review the pertinent case law regarding each of these elements, in reverse order —good cause, then 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 a concept that 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),[10] 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),[11] our 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.[12]

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[10] 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964).

[11] 115 R.I. 33, 340 A.2d 137 (1975).

[12] Murphy, 115 R.I. at 37, 340 A.2d at 139.

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."[13]

And finally, in Powell v. Department of Employment Security, Board of Review (R.I. 1984),[14] 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."[15]

C

LEAVING VOLUNTARILY FOR GOOD CAUSE — "VOLUNTARINESS"

In Kane v. Women and Infants Hospital of Rhode Island (1991),[16] our Supreme Court has interpreted § 17 in a manner that gives effect[17] to the word "voluntarily," declaring that —

> To recover under § 28-44-17, an employee must leave for both good cause

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13 Murphy, 115 R.I. at 35, 340 A.2d at 139.

14 477 A.2d 93 (R.I. 1984).

15 477 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).

16 Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991).

17 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).

and voluntarily."[18]

Therefore, a finding that a worker resigned from a position does not preclude a finding that the worker did so involuntarily.[19] And so, to understand this seeming paradox, we will now review the Kane case in a bit more depth.

The Kane case is a cornerstone of our understanding of "voluntariness" as that term is used in § 17. In Kane, the Court considered the unemployment-benefit claim of a hospital employee who — when facing discharge for misconduct — took an early retirement.[20] 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 (then in effect) dictated such a finding; by declaring quitting pursuant to a retirement plan to be good cause per se.[21] And so, with the good-cause issue resolved, the Court was free to focus its attention on the element of voluntariness — an issue of first impression.[22]

The Court began by stating the majority rule as follows —

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

19 Kane, 592 A.2d at 139-40.

20 Kane, 592 A.2d at 138.

21 For the language of this provision as it then existed, see Kane, 592 A.2d at 138. Section 17 no longer contains this provision.

22 See Kane, 592 A.2d at 139.

> … 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).[23]

Thus, the majority rule is that claimants who quit in the face of a discharge for poor performance are regarded as having quit involuntarily; the Kane Court embraced and extended this rule, bringing within its orbit those who resign while facing discharge for misconduct.[24] Having decided that Ms. Kane did not quit voluntarily, but was terminated, the Court then reviewed the record to determine whether she was terminated for misconduct.

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[23] See Kane, id.

[24] See Kane, id.

D

LEAVING VOLUNTARILY FOR GOOD CAUSE — "LEAVING" BY "CONSTRUCTIVE QUIT"

The Board of Review found that Mr. Solitro abandoned his job at Venda Ravioli by failing to appear for work and failing to call-in to explain his absence during the week beginning Monday, November 25, 2013. In so finding, the Board implicitly invoked 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. In our sister states, this theory is generally known as the doctrine of "constructive voluntary leaving."[25] We shall now present a short overview of this doctrine as it exists nationally and locally.

1

The Doctrine — As Nationally Viewed

After conducting an exhaustive review of cases from other jurisdictions — I have concluded that the following is a consensus description of the doctrine of the constructive voluntary quit. It is taken from Keanini v. Akiba, a 1997 decision of the Hawaii appeals court:

> 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

[25] 76 AM. JUR. 2d Unemployment Compensation, § 105 and 81 C.J.S. Social Security and Public Welfare, § 406.

> 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.[26]

Thus, the doctrine 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.[27] The doctrine has been accepted in some jurisdictions,[28] rejected in others.[29]

But courts throughout this nation have expressed concern that unless the rule is narrowly defined, a great many terminations could be inappropriately deemed within

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[26] See Keanini v. Akiba, 84 Hawai'i 407, 412, 935 P.2d 122, 127 (Haw. App. 1997) (Emphasis added).

[27] See Keanini, ante, and Bertini v. Administrator, Unemployment Compensation Act, 39 Conn. Supp. 328, 331, 464 A.2d 867, 870 (Conn. 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).

[28] 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.

[29] 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.

its ambit.[30] Thus, even in jurisdictions that recognize the doctrine, courts have endeavored to keep it reined in.

2

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 — often, while out on an extended family leave[31] or while incarcerated,[32] or in other cases wherein the Claimant simply was AWOL (absent without leave).[33]

Id., 84 Hawai'i at 411, 935 P.2d at 127, n. 6.

30 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, 182, 922 P.2d 555, 564 (1996).

31 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).

32 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.).

33 See Paquette v. Department of Labor and Training Board of Review, A.A. No. 12-

And, in Rhode Island, we focus not on foreseeability but on job abandonment as the theoretical basis for the doctrine. Thus, the doctrine has been properly circumscribed. A recent example of our jurisprudence in this area is Belanger v. Department of Labor and Training Board of Review (2013), wherein we noted —

> 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.[34]

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).

[34] 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).

Again, the critical question under our constructive quit (or job abandonment) jurisprudence is whether the worker truly intended to separate. We reiterated this holding earlier this year in Juan Rosales v. Department of Labor and Training Board of Review, A.A. No. 2014-074, slip op. at 26-36 (Dist.Ct. 05/29/2015).[35]

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

[35] This is not to gainsay that this Court has, albeit occasionally, allowed constructive-quit determinations to stand in doctrinally debatable circumstances, especially in pro-se cases where the result of a misconduct analysis was certain. See Adejoke Jaiyeola v. Department of Labor and Training, Board of Review, A.A. No. 12-124, slip op. at 7-9 (Dist. Ct. 09/27/2012)(Claimant, who failed to appear for shifts called, and after trying twice to speak to Director of Nursing, never called again).

(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.' "[36] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[37] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[38]

IV
ANALYSIS
A
THE SECTION 17 ISSUE — JOB ABANDONMENT
1
The Evidence of Record

a. The Testimony of Claimant Solitro

At the December 11, 2014 hearing conducted by Referee Howarth the first

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[36] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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

[38] 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).

witness was the Claimant, Mr. Lawrence Solitro.[39] He began his testimony under questioning by Referee Howarth.[40] He stated that his employment as a meat cutter at Venda Ravioli spanned the period from April to November of 2013.[41]

When Mr. Solitro was asked by the Referee how and why he became separated from Venda Ravioli, he said he had been terminated — and denied that he had voluntarily quit.[42] He stated that while he was out of work due to illness he went into the store (on the Friday after Thanksgiving) to pick up his prior week's paycheck; he was referred up to Mr. Costantino's office.[43] Mr. Solitro indicated that the employer had been given a copy of his medical excuse, which indicated no prolonged standing for four to six weeks.[44] Claimant said they talked about the doctor's letter and Mr. Costantino said — "What are we going to do? I have a business to run and the

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39 Referee Hearing Transcript, at 11 et seq.

40 Referee Hearing Transcript, at 6.

41 Referee Hearing Transcript, at 12. At this point, the Referee drew his attention to the reasons why he failed to appear at the prior Referee hearing. Referee Hearing Transcript, at 12-14. After which, she questioned him regarding why he filed his appeal late. Referee Hearing Transcript, at 15-20.

42 Referee Hearing Transcript, at 21-22. At this juncture, the Referee obtained the consent of the employer to consider the issue of termination as well as the issue that was noticed (a quitting). Referee Hearing Transcript, at 22-23.

43 Referee Hearing Transcript, at 23.

44 Referee Hearing Transcript, at 23-24, 26-27.

holidays are coming."[45] Mr. Costantino further indicated that he could not wait for Mr. Solitro and he could not promise he would keep his job open for him.[46]

At the conclusion of this conversation, Mr. Solitro believed that he was being terminated.[47]

b. Testimony of Mr. McLynch

The next witness was Mr. Michael McLynch, the Manager of Venda Ravioli.[48] He said Mr. Solitro was terminated for "lack of contact."[49] He explained that Claimant was due into work on Monday, November 25, 2013, but he did not appear.[50] As it was quite busy, he inquired of the personnel in the office whether anyone had heard from him, but was told no.[51] He called Claimant's house personally several times, as did others throughout the week, leaving messages for him to call.[52] But he neither called-in nor reported-in all week.[53] And so, they considered him to have abandoned his job as

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45 Referee Hearing Transcript, at 24.

46 Referee Hearing Transcript, at 26. Finally, Mr. Costantino told Mr. Solitro that he did not have his check for him. Id.

47 Id.

48 Referee Hearing Transcript, at 29 et seq.

49 Referee Hearing Transcript, at 29.

50 Referee Hearing Transcript, at 30.

51 Referee Hearing Transcript, at 30.

52 Id.

53 Id.

of Friday, when he came to pick up his paycheck.[54]

c. The Testimony of Mr. Costantino

Finally, Mr. Costantino testified.[55] Asked to explain how Mr. Solitro came to be terminated, he responded —

> He came up to the office. Ah, at that point I see him. I asked him what was going on, and I said are you coming back to work? He then indicated to me, in front of several people, I can no longer do this. I physically cannot do this any longer. And at that point I assumed he wasn't coming back. Ah, it was subsequent to that point that we started looking for additional help because the department always requires three men. He was the third man on the shift, so I had to - - I definitely had to replace him, based on the information he gave me.[56]

In addition, Mr. Costantino denied seeing any medical documentation regarding Mr Solitro's health issues — which the employer did not dispute.[57] He also denied that Mr. Solitro ever mentioned that he was seeing a doctor or needed a certain amount of

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54 Referee Hearing Transcript, at 31.

55 Referee Hearing Transcript, at 33 et seq.

56 Referee Hearing Transcript, at 34. It may be noted that Mr. Costantino quoted Mr. Solitro as saying he was not able to return to work. Ironically, if Venda had acted upon this statement (firing him because he was unwell), then Mr. Solitro could not be disqualified under § 17, since claimants who quit for medical reasons quit for good cause — though they are generally then disqualified because they are not able to work under § 12. In any event, we cannot proceed on this theory since the truth of the statement made by Mr. Solitro was not found as a fact by the Board and Mr. Solitro disputes saying it. As a result, in order to address the implications of this statement, we would have to remand the case to the Board for further fact-finding on this issue.

57 Id.

time off, though he did concede that when Mr. Solitro said he could not return to work he might have responded that the store would have to replace him.[58]

In answer to a question from Mr. Solitro, Mr. Costantino said he did not remember holding a doctor's note in his hand during their conversation.[59] And he explained that when he said that Mr. Solitro told him that he could not return to work "in front of several people" — he meant that the door (to his office) was open, and other people could hear the comment.[60]

d. Further Examination of Claimant Solitro

At this point the Referee asked Mr. Solitro if he had taken the whole week off.[61] He answered yes.[62] And he conceded that he had not contacted his employer, because he was worried.[63] With this, the portion of the hearing dedicated to the issue of the separation ended.[64]

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Discussion

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58 Referee Hearing Transcript, at 35-36.

59 Referee Hearing Transcript, at 36.

60 Referee Hearing Transcript, at 37.

61 Referee Hearing Transcript, at 38.

62 Referee Hearing Transcript, at 39.

63 Id.

64 At this juncture the Referee turned to the issue of the repayment order. Referee Hearing Transcript, at 41.

In the instant case, the Board of Review (adopting the decision of the Referee as its own)[65] found that Claimant Solitro had abandoned his position (or constructively quit) at the Venda Ravioli store by failing to report for work and failing to notify his employer of the reasons for his absence; because the Board found that Mr. Solitro had not shown good cause for his separation, he was deemed disqualified (from the receipt of benefits) pursuant to § 28-44-17.[66]

In § 17 cases, the parties generally dispute whether the claimant's reason for resigning constituted good cause; however, in this case this foundational question of whether Claimant quit or was fired is indeed contested. Mr. Solitro urges he was fired; but, the employer asserts that he quit. And so, we must decide whether the Board's conclusion that Mr. Solitro quit by abandoning his job is supported by competent evidence of record. As we foreshadowed, ante, it is very important that we build and maintain the proper boundaries between these two concepts.

a. The Separation — A Firing or a Quitting

The Board of Review found that Claimant had abandoned his employment at

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[65] 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" where appropriate.

[66] Decision of Referee, at 3.

Venda Ravioli, thereby invoking the doctrine of the constructive quit, which has been explained ante, in Part II-D of this opinion. 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 substantial evidence on the whole record."[67] Notwithstanding our limited review regarding the factual findings of the Board, which I entirely accept, I believe we must conclude that Mr. Solitro did not quit expressly or constructively; he was fired.

This is not a scenario where the Claimant failed to stay in touch for an extended period of time.[68] He was not unavailable due to incarceration;[69] he did not abandon contact while on an extended family leave.[70] And Venda did not fire him while he was out-of-touch. He was deemed to have quit (and fired) after he surfaced (to pick up his paycheck), not before.

I detect no intent on Claimant's part to permanently abandon his job.

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67 See Gen. Laws 1956 § 42-35-15(g)(5).

68 The doctrine (at least as it is applied in Rhode Island) exists in order to rescue employers from the quandary which arises when employees disappear. They might hesitate to terminate the employee, fearing they might later be charged for unemployment benefits if it later comes to light that the employee was unable to report-in due to circumstances beyond his or her control. The dilemma arises from the fact that, when they terminate, the employers do not know why the employee is out of communication. This is not the case here.

69 See cases cited ante at 14, n. 32.

70 See cases cited ante at 14, n. 31.

And so, I believe this is an inappropriate invocation of the doctrine of constructive-quitting, impinging on the domain of § 18, and its disqualification of claimants who were fired for misconduct. As we noted ante at 14-15, the test for the invocation of the doctrine of the constructive-quit is whether we can detect an unexpressed desire to quit.[71] This point was reiterated by this Court most recently (and thoroughly) in Juan Rosales v. Department of Labor and Training, Board of Review, A.A. No. 14 – 074, slip op. at 26-36 (Dist.Ct. 05/29/2015).[72] And so, for the reasons stated above, I find that the Board's finding of job abandonment is clearly erroneous.

b. The Separation — Voluntariness

We will now briefly consider the issue of voluntariness. Here, Claimant's failure to be at work was due to illness — an assertion the employer did not contest. He could not stand (literally) to do his job. To the extent that one argues that he did abandon his job, it was clearly for grounds outside his volition.[73] And so, for this reason as well, Mr. Solitro cannot be deemed to have quit voluntarily for good cause.

c. The Separation — Good Cause

Similarly, the cause of Claimant's absence from work was illness, which the

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[71] 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).

[72] I note that the decision rendered by the Board of Review in the instant case was published before our decision in Rosales was published.

employer did not dispute. It has long been held that one who terminates due to illness[74] is deemed to have quit for good cause.[75] Accordingly, any separation attributed to Claimant Solitro (whether express or constructive) that was prompted by his medical condition would have to be deemed to have been grounded on good cause.

d. Resolution

And so, for the reasons enumerated above, I conclude that the decision of the Board of Review holding that Mr. Solitro voluntarily left the employ of Venda Ravioli without good cause is clearly erroneous. I shall therefore recommend that his disqualification from the receipt of benefits pursuant to § 28-44-17 be set aside. Consequently, we must consider, following the example our Supreme Court established in Kane, whether Claimant Solitro is subject to disqualification for proved misconduct.

B

THE SECTION 18 ISSUE — MISCONDUCT

We are taught by our Supreme Court's opinion in Kane, ante, that whenever we

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[73] Referee Hearing Transcript, at 23-24.

[74] This principle has been extended to the case where an employee must quit to care for a member of his or her family.

[75] Of course, if such employees apply for benefits, they are generally subject to disqualification pursuant to Gen. Laws 1956 § 28-44-12 (Availability).

set aside a determination of the Board of Review that a claimant quit — and find instead that the claimant was fired — we must then then ask whether the claimant was terminated for proved misconduct.[76] Normally, this issue would be decided in the first instance by the Board of Review (or one of its designee Referees). We could, of course, remand the case to the Board for that purpose. But, in this case, we need not do so. Instead, we shall proceed entirely on the basis of the facts found in the Board's decision and the Claimant's testimony.

[76] See Kane, 592 A.2d at 139-40, discussed ante at 9-11. While Kane is our guiding light in this area, we may also recall that a reviewing Court may uphold a decision on grounds other than those relied upon by the lower court or agency. See DeSimone Electric v. CMG, Inc., 901 A.2d 613, 620-21 (R.I. 2006).

1

The Statutory Standard

Gen. Laws 1956 § 28-44-18, provides:

> **28-44-18. Discharge for misconduct. —** … For benefit years on and after July 1, 2012 and prior to July 6, 2014, an individual who has been discharged for proved misconduct connected with his or her work shall become ineligible for waiting period credit or benefits for the week in which that discharge occurred and until he or she establishes to the satisfaction of the director that he or she has, subsequent to that discharge, had at least eight (8) weeks of work, and in each of that eight (8) weeks has had earnings greater than, or equal to, his or her weekly benefit rate for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. … Any individual who is required to leave his or her work pursuant to a plan, system, or program, public or private, providing for retirement, and who is otherwise eligible, shall under no circumstances be deemed to have been discharged for misconduct. If an individual is discharged and a complaint is issued by the regional office of the National Labor Relations board or the state labor relations board that an unfair labor practice has occurred in relation to the discharge, the individual shall be entitled to benefits if otherwise eligible. For the purposes of this section, "misconduct" is defined as deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence. Notwithstanding any other provisions of chapters 42 – 44 of this title, this section shall be construed in a manner that is fair and reasonable to both the employer and the employed worker.

(Emphasis added). In the case of Turner v. Department of Employment and Training, Board of Review, 479 A.2d 740, 741-42 (R.I. 1984), the Rhode Island Supreme Court embraced a definition of the term "misconduct" that was previously pronounced in a

decision of the Wisconsin Supreme Court —Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941):

> 'Misconduct' * * * is limited to conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute.

The employer bears the burden of proving by a preponderance of evidence that the claimant's actions constitute misconduct as defined by law.[77]

2

Resolution

Claimant Solitro admitted that he had been absent from work all week and had not called in. He relied solely upon the physician's note to speak for him. And Claimant admitted he did so intentionally — because he was "worried." He thereby totally neglected his duty to keep his employer informed of the reason for his absence. But this sin of omission must be viewed as trivial stands when compared with his affirmative (and intentional) failure to respond to telephone messages that were left by

[77] Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training, 854 A.2d 1008, 1018 (R.I. 2004).

the employer. This is patent misconduct destructive of the employment relationship. Here, Claimant showed a blatant disregard of the employer's interests. I therefore recommend that Mr. Solitro be disqualified for proved misconduct pursuant to § 28-44-18.

V
REPAYMENT

Finally, Claimant was ordered to repay $13,650.00 by the Director,[78] pursuant to 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) 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 and where, in the judgment of the director, that recovery would defeat the purpose of chapters 42 - 44 of this title.

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was not at fault and where recovery

would not defeat the purposes of the Act. In my view "fault" implies more than a mere causative relationship for the overpayment, it implies moral responsibility in some degree — if not an evil intent per se, at least indifference or a neglect of one's duty to do what is right.[79] To find the legislature employed the term fault in a broader sense of a simple error would be — in my view — to render its usage meaningless. With this in mind, we may now turn to the circumstances of the overpayment in the instant case.

When reviewing the Director's order, the Referee found that:

> * * * When he filed his claim for Employment Security benefits, the claimant informed the Department that he had been discharged, although he had actually voluntarily quit his job. As a result of the claimant's misrepresentation, he received benefits to which he was not entitled. The claimant is, therefore, overpaid for the weeks ending January 4, 2014 through July 19, 2014 and at fault for the overpayment. Accordingly, it would not defeat the purpose of the Act to require that the claimant make restitution.

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[78] See Director's Decision, September 25, 2014. Department's Exhibit No. 2.

[79] In the Webster's Third New International Dictionary (2002) at 839 the first definition of fault applicable to human conduct defines "fault" as "3: A failure to do what is right. a: a moral transgression." This view is longstanding. As Noah Webster stated in the first edition of his American Dictionary of the English Language (1828), "Fault implies wrong, and often some degree of criminality."

Referee's Decision, December 18, 2014, at 3. So, the Referee found fault based on Claimant's "misrepresentation" to the Department that he was fired — when he actually quit, albeit impliedly.[80]

Given my rejection of the Director's, the Referee's, and the Board of Review's finding that Claimant abandoned his job, the finding that he misled the Department by saying he was terminated must also be set aside. Therefore, the order of repayment ought to be reversed as well.

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.[81]

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[80] We need not, and shall not, reach the question of whether a Claimant's statement that he or she was fired can ever be deemed to be, per se, a misrepresentation when he or she was found to have quit by job abandonment or any other sort of constructive quitting.

[81] 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 16. And, Guarino, ante at 17, n. 36.

Upon careful review of the evidentiary record submitted to this Court, I conclude that the Board's decision disqualifying Mr. Silitro 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.[82] Nevertheless, I find he must be disqualified for misconduct pursuant to § 28-44-18. However, I also find that the order of repayment must be set aside because his representation to the Department that he was terminated was not false; accordingly, that representation cannot be deemed fault within the meaning of § 28-42-68.

I therefore recommend that the Decision of the Board of Review rendered in this case be AFFIRMED as to eligibility but REVERSED as to the order of repayment.

/s/
Joseph P. Ippolito
Magistrate

OCTOBER 16, 2015

[82] Gen. Laws 1956 § 42-35-15(g)(3),(4).