STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

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

Martin J. Phillips	:	
	:	
v.	:	**A.A. No. 15 – 091**
	:	
Department of Labor and Training,	:	
Board of Review	:	

O R D E R

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

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

ORDERED, ADJUDGED AND DECREED,

that the Findings & Recommendations of the Magistrate are adopted by reference as the Decision of the Court and the decision of the Board of Review is REVERSED.

Entered as an Order of this Court at Providence on this 28th day of December, 2015.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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F I N D I N G S & R E C O M M E N D A T I O N S

Ippolito, M. In this case Mr. Martin J. Phillips urges that the Board of Review of the Department of Labor and Training erred when it held that he was not entitled to receive employment security benefits because he left his prior employment without good cause. Jurisdiction to hear and decide appeals from decisions made by the Board of Review is vested in the District Court by Gen. Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to Gen. Laws 1956 § 8-8-8.1. For the reasons stated below, I conclude that the decision issued by the Board of

Review in this matter is not supported by the facts of record and the applicable law. I shall therefore recommend that it be REVERSED.

I
FACTS & TRAVEL OF THE CASE

Mr. Martin J. Phillips was employed by the Wal-Mart Corporation for twenty months as an overnight stocker until April 27, 2015, when he resigned. He filed for unemployment benefits and, on June 4, 2015, a designee of the Director deemed him ineligible to receive benefits because he resigned without good cause, since there was no evidence that the job had become unsuitable, as defined in Gen. Laws 1956 § 28-44-17. Mr. Phillips appealed from this decision and, as a result, Referee Nancy Howarth conducted a hearing into the matter on July 13, 2015, at which Ms. Rodrigues appeared pro-se; no representatives of the employer appeared.

In her decision, issued on July 20, 2015, Referee Howarth made the following Findings of Fact:

> The claimant was employed as an overnight stocker by the employer. This position required physical labor. The claimant began experiencing problems with his knee on January 25, 2015. As a result, he left work on January 28, 2015 prior to the end of his shift. The claimant was absent, with notice, for his next shift on January 29, 2015. He was scheduled to return to work on February 1, 2015. He worked a partial shift, due to continuing problems with his knee. The claimant was admitted to the hospital from February 4, 2015 through February 8, 2015. He was granted a leave

> of absence through April 28, 2015. The claimant was released by his doctor to return to work without restrictions as of March 22, 2015. On April 22, 2015 the claimant advised the employer that he was able to return to work. The claimant worked from April 24 through the morning of April 27, 2015. The claimant was unable to report to work that night, again due to issues with his knee. Since the claimant had received warnings regarding his attendance indicating that continued absences could result in termination, he voluntarily resigned his job on April 30, 2015.
>
> Although the claimant states that he was medically unable to work subsequent to April 27, 2015, he has failed to provide documentation to substantiate his statement.

Referee's Decision, July 20, 2015, at 1. Based on these findings, Referee Haworth formed the following conclusions regarding Mr. Phillips' separation:

> 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. The record is void of any evidence to indicate that the claimant was unable to work in his position subsequent to March 22, 2015. The evidence and testimony establish that the claimant did have a reasonable alternative, other than to terminate his employment. If the claimant was actually medically unable to work at the time of his separation, the claimant could have obtained medical documentation to verify his condition at the time he was separated from his job. Since the claimant had a reasonable alternative available to him, which he chose not to pursue, I must find that his leaving is without good cause under the above Section of the Act. Accordingly, benefits are denied on this issue.

Referee's Decision, July 20, 2015, at 2. Thus, the Referee found Mr. Phillips to be disqualified from receiving benefits because he left work without good cause,

because he had not shown that that he was (physically) unable to work. On this basis, he was declared ineligible to receive benefits. Id.

Mr. Phillips filed an appeal, which the Board of Review considered on the basis of the record generated by the Referee. On September 4, 2015, a majority of the members of the Board of Review issued a decision holding that the decision of Referee Haworth was a proper adjudication of the facts and the law applicable thereto. Decision of Board of Review, September 4, 2015, at 1. Accordingly, the decision of the Referee was affirmed. Id.

We should note, however, that the Member of the Board of Review Representing Labor filed a succinct dissenting opinion, which expressed the view that Mr. Phillips left Wal-Mart for health reasons not attributable to the employer. For this reason, he concluded benefits should have been allowed.

Finally, on October 5, 2015, Mr. Phillips filed a complaint for judicial review in the Sixth Division District Court.

II
APPLICABLE LAW
A
LEAVING FOR GOOD CAUSE — THE STATUTE

The resolution of this case involves the application of § 28-44-17, the provision of the Rhode Island Employment Security Act which delineates the

circumstances in which those who quit their prior employment may nonetheless be deemed eligible to receive unemployment benefits; it provides:

> **28-44-17. Voluntary leaving without good cause.** – (a) For benefit years beginning on or after 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 earnings greater than, or equal to, eight (8) times his or her weekly 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 ….

Based on our reading of § 17, we may discern that it enumerates three preconditions to eligibility — 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 (this last the most frequently litigated element of § 17).

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,[1] the Rhode Island Supreme Court declared 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),[2] 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.[3]

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1 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964).

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

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."[4]

And finally, in Powell v. Department of Employment Security, Board of Review (R.I. 1984),[5] 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."[6]

This Court has long held that a quitting necessitated by health reasons is a leaving for good cause, as defined in § 28-44-17. E.g. Bushell v. Department of Employment and Training Board of Review, A.A. No. 95-133, at 7-8 (Dist.Ct. 05/30/96)(DeRobbio, C.J.) and Korzeniowski v. Department of Employment and Training Board of Review, A.A. No. 93-139, at 7 (Dist.Ct. 02/16/94) (Rocha, J.).

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3 Murphy, 115 R.I. at 37, 340 A.2d at 139.

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

5 477 A.2d 93 (R.I. 1984).

6 477 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).

C

LEAVING VOLUNTARILY FOR GOOD CAUSE — "VOLUNTARINESS"

In Kane v. Women and Infants Hospital of Rhode Island,[7] our Supreme Court interpreted § 17 in a manner that gives effect[8] to the term "voluntarily," declaring that —

> To recover under § 28-44-17, an employee must leave for both good cause and voluntarily."[9]

Therefore, a finding that a worker resigned from a position does not preclude a finding that the worker did so involuntarily.[10] And, to understand this seeming paradox, we will now review the Kane case in a bit more depth.

The Kane decision 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

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

[8] 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).

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

[10] Kane, 592 A.2d at 139-40.

discharge for misconduct — took an early retirement.[11] 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.[12] 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.[13]

The Court began by stating the majority rule as follows —

> … 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

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11 Kane, 592 A.2d at 138.

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

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

> will be terminated, does not leave voluntarily. Perkins v. Equal Opportunity Commission, 234 Neb. 359, 362, 451 N.W.2d 91, 93 (1990).[14]

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 ambit those who resign while facing discharge for misconduct.[15] Having decided that Ms. Kane did not quit voluntarily, the Court then reviewed the record to determine whether she should be disqualified for proved misconduct under § 28-44-18; doing so, it found she would be.[16]

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:

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14 See Kane, id.

15 See Kane, id.

16 See Kane, 592 A.2d at 140.

(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.' "[17] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[18] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[19]

The Supreme Court of Rhode Island stated in Harraka,[20] that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

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17 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)).

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

19 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).

20 Harraka, 98 R.I. at 200, 200 A.2d at 597, cited ante at 6.

> * * * eligibility for benefits is to be determined in the light of the expressed legislative policy that "Chapters 42 to 44, inclusive, of this title shall be construed liberally in aid of their declared purpose which declared purpose is to lighten the burden which now falls upon the unemployed worker and his family." G.L. 1956, § 28-42-73. The legislature having thus declared a policy of liberal construction, this court, in construing the act, must seek to give as broad an effect to its humanitarian purpose as it reasonably may in the circumstances. Of course, compliance with the legislative policy does not warrant an extension of eligibility by this court to any person or class of persons not intended by the legislature to share in the benefits of the act; but neither does it permit this court to enlarge the exclusionary effect of expressed restrictions on eligibility under the guise of construing such provisions of the act.

IV
ANALYSIS

When an appeal from a Board of Review decision denying unemployment benefits under § 28-44-17 comes to us, we must decide whether it is clearly erroneous in light of the reliable, probative, and substantial evidence of record. For the reasons I shall explain (after a brief review of the testimony and evidence taken at the hearings conducted by the Referee and the Board of Review), I have concluded that the Board's decision in the instant case (finding Mr. Phillips quit voluntarily) is clearly erroneous. I must therefore recommend that the decision rendered by the Board of Review in this case be reversed.

A
THE EVIDENCE OF RECORD — THE REFEREE HEARING

Mr. Phillips was the sole witness at the hearing conducted by Referee Haworth in this case. Referee Hearing Transcript, at 4. After marking the exhibits that had been transferred from the Department, the Referee asked Claimant whether he had any other documents to present. Id. When he said that, while he had some, there were others he wanted to present, the Referee said he could forward them within the next day. Referee Hearing Transcript, at 5.

Mr. Phillips then began to testify regarding the circumstances of his departure from Wal-Mart. Referee Hearing Transcript, at 8. He described Wal-Mart's "rolling attendance" policy. Referee Hearing Transcript, at 9. He explained that after three excused absences in a six-month period you are "coached." Id. As a result, when, in January of 2015, he got an intestinal infection (which caused him to be absent for five days), he was "written-up" for the absences and had to apply for a leave, since he already had two excused absences. Referee Hearing Transcript, at 9-10.[21]

[21] Initially, when asked by the Referee asked Mr. Phillips when he was written-up, he said "around" January 18th. Referee Hearing Transcript, at 10. He later revised this, saying he went back to work on the 25th. Referee Hearing Transcript, at 12.

In the same time-frame, Mr. Phillips also suffered a fall (on ice) at his home. Referee Hearing Transcript, at 11-12.[22] And when he went back to work, his knee swelled-up severely — so much so that he did not finish his shift on January 28th. Referee Hearing Transcript, at 12. On the morning of the 30th, he went to Kent County Hospital, where they took about a pint of fluid from his knee, and checked for infection. Referee Hearing Transcript, at 13.

Although he was in pain, he returned to work for several days (beginning on February 1st). Referee Hearing Transcript, at 13. But his knee blew up again, necessitating him to make another visit to the hospital on February 4th. Id. This time the doctors admitted him, because they believed his knee had become infected. Id. He was released on the 7th. Referee Hearing Transcript, at 13-14.

At this point his employer granted him a medical leave through April 28th. Referee Hearing Transcript, at 14. But, an application he had filed for TDI was denied, because he did not have sufficient wages in his base period. Referee Hearing Transcript, at 14-15.

And, while knee-surgery was indicated (to repair two possible tears), he told the doctor he had to go back to work, because he had no income. Referee Hearing Transcript, at 15. As a result, the doctor administered cortisone, which

[22] Mr. Phillips said the fall occurred on the day before he got the infection. Referee Hearing Transcript, at 11.

helped the swelling go down. Id. He saw the doctor again on April 19, 2015. Referee Hearing Transcript, at 16. And he returned to work on April 24, 2015. Id. Unfortunately, his knee swelled-up again; so, the following week, he again missed two days' work. Referee Hearing Transcript, at 16. When he returned to work, he was written-up. Id.

Mr. Phillips described his last shift at Wal-Mart — on April 27, 2015 — as being particularly strenuous. Referee Hearing Transcript, at 18. He indicated his manager was not giving him any lee-way for the fact that he was still healing. Id. As a result, he could not go in the next evening. Referee Hearing Transcript, at 18-19. He testified that he called-in twice, but no managers came to the phone. Referee Hearing Transcript, at 19.

Mr. Phillips was discharged on April 30, 2015. Referee Hearing Transcript, at 20. He spoke to an Assistant Manager named "Gary" and told him that he was not going to be able to continue. Referee Hearing Transcript, at 21. He resigned his position because he believed he would be fired, in light of a prior conversation he had had with the store manager, Merrill, in which he was warned that on the next instance of lateness or absence he would be terminated. Referee Hearing Transcript, at 20-21. He thought it would be better than being fired, making him rehire-able. Referee Hearing Transcript, at 22.

B

DISCUSSION

The Board of Review (adopting the decision of the Referee as its own) found that Mr. Phillips failed to satisfy his burden of proving that he was unable to work due to illness. And while, as we noted ante, at 7, a debilitating illness can constitute a good cause to quit under § 28-44-17, the Board has consistently noted that assertions of illness must be substantiated by medical evidence. E.g. Lozeau v. Department of Employment Security Board of Review, A.A. No. 88-232, at 3-5 (Dist.Ct. 5/9/91)(DeRobbio, C.J.). And it was on this basis that Mr. Phillips' claim was rejected — facially, at least, a most plausible decision.

But I do not believe we can reach the issue of good cause in this case, because I do not think the Board should have considered it. It is uncontested that Mr. Phillips resigned in the face of a certain termination for absenteeism. The Referee made such a finding —

> … Since the claimant had received warnings regarding his attendance indicating that continued absences could result in termination, he voluntarily resigned his job on April 30, 2015. …

Referee's Decision, July 20, 2015, at 1, quoted ante at 3. This finding (which was fully supported by the record, Referee Hearing Transcript, at 20-22), should have triggered a further finding that Mr. Phillips' resignation was not voluntary. Consequently, the Board should have moved from a good cause analysis under § 17 to a misconduct analysis under § 18 — as is required by our Supreme Court's

decision in Kane v. Women and Infants Hospital of Rhode Island, discussed ante at 8-10. And the Board's failure to do so constituted an error of law.

While it is within this Court's discretion to remand the instant case to the Board of Review for consideration of the misconduct issue, I shall not recommend doing so, for two reasons. Firstly, while the medical evidence included in the record may not have been sufficiently persuasive to satisfy the Board that he had good cause to quit (concerning which Mr. Phillips bore the burden of proof), that same evidence is, in my view, sufficient to remove any suggestion that Mr. Phillips's absences were the product of an intentional disregard for the employer's interests. Quite simply, Mr. Phillips was quite ill during the period of time under consideration and could not work. Secondly, the employer did not participate in the Referee hearing. I do not believe that fairness requires it have a second opportunity to be heard when it did not deign to participate in the first.

C

RESOLUTION

Pursuant to Gen. Laws 1956 § 42-35-15(g), the decision of the Board must be upheld unless it was, inter alia, contrary to law, clearly erroneous in light of the substantial evidence of record, or arbitrary or capricious. When applying this standard, the Court will not substitute its judgment for that of the Board as

to the weight of the evidence on questions of fact, including the question of which witnesses to believe.[23] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[24] Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated his employment voluntarily (and without good cause) is clearly erroneous. I must therefore recommend that Mr. Phillips' disqualification under § 28-44-17 (Leaving without good cause) be reversed.[25]

V
CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, the instant decision was clearly

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

[24] Cahoone, ante n.23, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), ante at 10-11 and Guarino, ante at 11, n.17.

[25] While I do not believe the matter needs to be remanded for consideration of the misconduct issue, neither am I suggesting that the Department of Labor and Training is not entitled to consider the Claimant's compliance with Gen. Laws 1956 § 28-44-12, particularly its requirement that the Claimant be able to work. To the contrary, I believe it has a duty to do so.

erroneous in view of the reliable, probative and substantial evidence on the whole record or arbitrary or capricious. Gen. Laws 1956 § 42-35-15(g)(5),(6).

Accordingly, I recommend that the decision of the Board be REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

December 28, 2015