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

Patricia A. Colella	:	
	:	
v.	:	A.A. No. 10 - 00178
	:	
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, the Court finds that the Findings & Recommendations of the Magistrate are supported by the record, and are an appropriate disposition of the facts and the law applicable thereto. It is, therefore,

ORDERED, ADJUDGED AND DECREED,

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

Entered as an Order of this Court at Providence on this 14th day of March, 2011.

By Order:

Melvin Enright
Acting Chief Clerk

Melvin J. Enright
Acting Chief Clerk

Enter:

Jeanne E. LaFazia
Chief Judge

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

Patricia A. Collela	:	
	:	
v.	:	A.A. No. 10-0178
	:	
Department of Labor & Training, Board of Review	:	

FINDINGS & RECOMMENDATIONS

Ippolito, M. In this administrative appeal Ms. Patricia A. Colella urges that the Department of Labor and Training Board of Review erred when it denied her request to receive Employment Security Benefits. Jurisdiction for appeals from the Department of Labor and Training Board of Review is vested in the District Court pursuant to 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 of the Board of Review finding that the claimant voluntarily left her employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 is supported by substantial evidence of record and was not affected by error of law; I therefore recommend that the decision of the Board of Review be affirmed.

FACTS & TRAVEL OF THE CASE

Claimant Colella was employed for a short time by CVS Corporation as a pharmacy technician. Her last day of work was February 26, 2010. She filed for Employment Security benefits immediately but on March 17, 2010, the Director of the Department of Labor and Training found that the claimant had voluntarily left her employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17 and denied the claim. The claimant filed a timely appeal and on June 10, 2010 a hearing was held before Referee William G. Brody. At the hearing only claimant appeared and testified. Referee Hearing Transcript dated June 10, 2010 at 1.

In his June 30, 2010 decision the referee made the following findings of fact:

> The claimant had worked for this employer for approximately one month. She quit her job because she was unhappy with the work hours when she learned that another employee had gotten an alternative work schedule which the claimant desired. The claimant felt that at adherence to the split shift work hours she was assigned inhibited her ability to obtain an additional job. This was full time employment.

Referee's Decision, at 1. Based on these findings, the Referee arrived at the following brief conclusion:

> * * *
> An individual who leaves work voluntarily must establish good cause for taking that action or else be subject to disqualification under the provisions of Section 28-44-17.
>
> [Quotation of section 28-44-17 omitted]
>
> The evidence that the claimant has presented does not establish that she had good cause to resign.

Referee's Decision, at 1-2. Thus, the referee determined that the Claimant voluntarily left her employment without good cause within the meaning of Section 28-44-17 of the Rhode Island Employment Security Act. Referee's Decision at 2. Accordingly, he affirmed the decision of Director. Id.

The claimant filed a timely appeal on July 13, 2010 and the matter was reviewed by the Board of Review. The Board did not conduct an additional hearing, but instead chose to consider the evidence submitted to the Referee pursuant to General Laws 1956 § 28-44-47. In its decision, dated August 18, 2010, the Board of Review affirmed the decision of the referee, finding it to be an appropriate adjudication of the facts and law applicable thereto and adopted the referee's decision as their own. See Decision Board of Review, August 18, 2010, at 1. Claimant then filed a timely appeal to this court for judicial review on September 17, 2010.

APPLICABLE LAW

This case involves the application and interpretation of the following provision of the Rhode Island Employment Security Act, which specifically touches on voluntary leaving without good cause; R.I. Gen. Laws § 28-44-17, provides:

> **28-44-17. Voluntary leaving without good cause.** – An individual who leaves work voluntarily without good cause shall be ineligible for waiting period credit or benefits for the week until he or she establishes to the satisfaction of the director that he or she has subsequent to that leaving had at least eight (8) weeks of work, and in each of those eight (8) weeks has had earnings of at least twenty (20) times the minimum hourly wage as defined in chapter 12 of this title for performing services in employment for one or more employers subject to chapters 42 – 44 of this title. * * * For the purposes of this section, 'voluntarily leaving work without good cause' shall include voluntarily leaving work with an employer to

> accompany, join or follow his or her spouse in a new locality in connection with the retirement of his or her spouse, or failure by a temporary employee to contact the temporary help agency upon completion of the most recent work assignment to seek additional work unless good cause is shown for that failure; however, that the temporary help agency gave written notice to the individual that the individual is required to contact the temporary help agency at the completion of the most recent work assignment to seek additional work.

In the case of Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597-98 (1964), the Rhode Island Supreme Court noted that a liberal reading of good cause would be adopted:

> To view the statutory language as requiring an employee to establish that he terminated his employment under compulsion is to make any voluntary termination thereof work a forfeiture of his eligibility under the act. This, in our opinion, amounts to reading into the statute a provision that the legislature did not contemplate at the time of its enactment.
>
> In excluding from eligibility for benefit payments those who voluntarily terminate their employment without good cause, the legislature intended in the public interest to secure the fund from which the payments are made against depletion by payment of benefits to the shirker, the indolent, or the malingerer.
> However, the same public interest demands of this court an interpretation sufficiently liberal to permit the benefits of the act to be made available to employees who in good faith voluntarily leave their employment because the conditions thereof are such that continued exposure thereto would cause or aggravate nervous reactions or otherwise produce psychological trauma.

Later, in Murphy v. Fascio, 115 R.I. 33, 340 A.2d 137 (1975), the Supreme Court elaborated that:

> The Employment Security Act was intended to protect individuals from the hardships of unemployment the advent of which involves a substantial degree of compulsion.
> Murphy, 115 R.I. at 37, 340 A.2d at 139.

and

> * * * unemployment benefits were intended to alleviate the economic insecurity arising from termination of employment the prevention of which was effectively beyond the employee's control."
> Murphy, 115 R.I. at 35, 340 A.2d at 139.

An individual who voluntarily leaves work without good cause is disqualified from receiving unemployment security benefits under the provisions of § 28-44-17. See Powell v. Department of Employment Security, 477 A.2d 93, 96 (R.I. 1984)(citing Harraka v. Board of Review of Department of Employment Security, 98 R.I. 197, 201, 200 A.2d 595, 597 (1964)). In order to establish good cause under § 28-44-17, the claimant must show that his or her work had become unsuitable or that the choice to leave work was due to circumstances beyond his or her control. Powell, 477 A.2d at 96-97; Kane v. Women and Infants Hospital of Rhode Island, 592 A.2d 137, 139 (R.I. 1991). The question of what circumstances constitute good cause for leaving employment is a mixed question of law and fact, and "when the facts found by the board of review lead only to one reasonable conclusion, the determination of 'good cause' will be made as a matter of law." Rocky Hill School, Inc. v. State of Rhode Island Department of Employment and Training, Board of Review, 668 A.2d 1241, 1243 (R.I. 1995) (citing D'Ambra v. Board of Review, Department of Employment Security, 517 A.2d 1039, 1040 [R.I. 1986]).

STANDARD OF REVIEW

Judicial review of the Board's decision by the District Court is authorized under § 28-44-52. The standard of review which the District Court must apply is set forth under

G.L. 1956 § 42-35-15(g) of the Rhode Island Administrative Procedures Act ("A.P.A."), which provides as follows:

> The court shall not substitute its judgment for that of the agency as to 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.

The scope of judicial review by this Court is limited by § 28-44-54, which, in pertinent part, provides:

> The jurisdiction of the reviewing court shall be confined to questions of law, and, in the absence of fraud, the findings of fact by the board of review, if supported by substantial evidence regardless of statutory or common law rules, shall be conclusive. 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. Guarino v. Department of Social Welfare, 122 R.I. 583, 588, 410 A.2d 425, 428 (1980) (citing § 42-35-15[g)][5]).

Stated differently, this Court will not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact. Cahoone v. Board of Review of the Department of Employment Security, 104 R.I. 503, 506, 246 A.2d 213, 215 (1968). "Rather, the court must confine itself to review of the record to determine whether "legally competent evidence" exists to support the agency decision." Baker v.

Department of Employment & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1993) (citing Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "Thus, the District Court may reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker, 637 A.2d at 363.

ANALYSIS

In this case, the Board determined that claimant left her job without good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act. I believe this finding is supported by substantial evidence. It is uncontested that claimant quit her job. The only question is whether she did so with good cause.

In support of her appeal, Appellant Colella has filed a memorandum of law which I have found most thought-provoking. It focuses on the fact that Ms. Colella was assigned by CVS to a so-called "split shift" — i.e., one in which the hours the employee works are not continuous but are separated by an interval. Claimant's shift was deeply split, gravely split — i.e., 8:00 A.M. to 12 noon and 4 P.M. to 8:00 P.M. Ms. Colella asserts she was misled into believing the split shift would be temporary and that she would not otherwise have accepted it. See Appellant's Memorandum at 5, 7.

However, claimant's testimony at the referee hearing — where she appeared without counsel — was not so focused. She testified from a narrative she had written and told the referee the story of her short career at CVS. Referee Hearing Transcript, at 4-12. Referee Brody allowed her to do so uninterrupted.

She cited many concerns. She indicated she needed the flexibility to work a second position. Referee Hearing Transcript, at 4, 6. She explained that she was hired in group, and some of the new employees were assigned a split shift. Referee Hearing Transcript, at 4-5. When members of the group protested, they were told nothing could be done, except that as subsequent hires came on board claimant and her classmates could request a normal schedule. Referee Hearing Transcript, at 5. Claimant also indicated that the split shift was affecting her health, especially a pre-existing back condition. Referee Hearing Transcript, at 6. She testified that the working conditions at CVS caused her "... mental pain and suffering along with physical and emotional stress ... ." Referee Hearing Transcript, at 7. She asserted she has ADD which causes her to act impulsively. Referee Hearing Transcript, at 8. She was also troubled that another new hire claimed she received a continuous shift because a relative works for CVS. Id. She also cited issues relating to her job duties. Referee Hearing Transcript, at 9.

As we can see from this summary, claimant asserted a host of reasons for quitting CVS, not merely her "split shift" schedule. For various reasons, the referee was within his discretion to find that none constituted good cause to quit under section 17.

First, scheduling issues are not generally regarded as a good reason to immediately quit under section 17. The view adopted in most cases is that an employee with an undesirable schedule has an alternative to quitting — i.e., maintaining her present position while searching for another. Second, medical issues tend to be found insufficient to constitute good cause to quit unless they are supported by medical documentation. While

it is true that claimant presented documentation of the diagnosis of ADD, the doctor did not state her condition prevented her from working a split shift or working at CVS generally. Third, claimant's desire to be available for part-time work can have no place in a good cause analysis relating to full-time work.

In light of these factors, I find that the Referee's finding that claimant lacked a good reason to quit within the meaning of section 17 is not clearly erroneous. Because the referee's conclusions are supported by substantial evidence, I must recommend that the referee's decision (which was adopted as the decision of the Board of Review) be affirmed.[1]

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[1] I note at this juncture that I have been able to locate no Rhode Island cases discussing "split shifts," either at the Supreme Court or District Court levels. Indeed, it appears that there are very few cases discussing the concept nationally. It appears that Thompson v. Schraiber, 253 Minn. 46, 90 N.W.2d 915 (1958) is still the only case in which the issue has come before a state's highest court. In Thompson, the Minnesota Supreme Court denied benefits where a waitress quit rather than accept a new schedule involving both morning and evening hours. 90 N.W. 2d at 915-17. The court noted that split shifts were common in the claimant's field of endeavor and no extenuating circumstances were presented. 90 N.W. 2d at 917-18.

Because the practice has not been litigated under the Rhode Island Employment Security Act, nothing in my analysis, in whole or in part, should be taken as an implied acquiescence in the practice of assigning split shifts. Such shifts are not the same as continuous shifts encompassing the same number of work hours. I believe this Court will need to examine carefully the real world impact of such shifts on employees on a case by case basis in any cases where they be challenged — most probably in appeals litigated under §§ 28-44-12 (Availability), 28-44-17 (Leaving For Good Cause), and 28-44-20 (Refusal of Suitable Work). It may be noted that Ms. Colella testified that CVS ended the practice after she quit.

CONCLUSION

After a thorough review of the entire record, this Court finds that the Board's decision to deny claimant Employment Security benefits under § 28-44-17 of the Rhode Island Employment Security Act was not "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record" 42-35-15(g)(3)(4). Neither was said decision "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g)(5)(6).

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

Joseph P. Ippolito
Magistrate

March 14, 2011