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

Julio Troch Soto	**:**	
	:	
v.	**:**	**A.A. No. 2011-171**
	:	
Department of Labor and Training ,	**:**	
Board of Review	**:**	

JUDGMENT

This cause came before Gorman J. on Administrative Appeal, and upon review of the record and a decision having been rendered, it is

ORDERED AND ADJUDGED

The decision of the Board is reversed and the matter is remanded for reconsideration.

Dated at Providence, Rhode Island, this 19th day of December, 2012.

Enter: **By Order:**

_____ _____

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Department of Labor & Training,	:	
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The complaint filed in this suit seeks a reversal of a decision of the Rhode Island Department of Labor and Training, Board of Review which determined that the plaintiff was not entitled to unemployment benefits because he left his job voluntarily without good cause. The board's decision affirmed earlier rulings by the Director of the Rhode Island Department of Labor & Training, and of a referee. This court has jurisdiction under Rhode Island General Laws 1956 § 42-35-15.

I. PROCEDURAL HISTORY AND FACTS

The plaintiff in this case worked for less than a year as a house keeper, and his separation from the company was voluntary. His last day of work was January 13, 2011. He applied for unemployment benefits in July 2011. At that time, the Director of the Department of Labor and Training determined that Mr. Soto had voluntarily left his job without good cause and

was thus not eligible for unemployment payments under the Rhode Island Employment Security Act. This decision was appealed, and after a hearing, a referee affirmed the director's determination. Plaintiff again appealed, and the Board of Review of the Department of Employment and Training affirmed the referee's ruling.

The testimony and documents presented to the referee, which comprise the evidentiary record in this case, show that the plaintiff worked for this employer for about five months He testified that he quit his job in order to take care of his aunt, a person he lived with all of his life, and who took care of him when he was a child. He said that she was "like a mother" to him. Ref. Tr., p. 16. Mr. Soto also sent a letter to the employer a few days after leaving. This letter stated that the reason he was "resigning [was] due to the current health problems that my aunt is having and the operation she is going to have which is coming up shortly." Cl. Ex. 1.

In addition to the full-time employment addressed in this case, plaintiff was paid on a part-time basis for providing care for his aunt. That part-time job, 25 hours per week, ended about three months after his "resignation," and he applied for benefits.

Two witnesses representing the employer testified that Mr. Soto told them that he had to leave his job because the combined income from his two

employers was going to cause his rent to rise to an unacceptable level. One witness testified that plaintiff told her "he was going back to just the one [job], taking care of his aunt, so his rent wouldn't go higher than what they could afford to pay." Ref. Tr., p. 24. See also Ref. Tr., p. 26.[1]

After the referee upheld the director's ruling that plaintiff was ineligible for unemployment benefits, Mr. Troche Soto appealed to the board of review. At the board hearing, virtually no new evidence was offered by either party[2], but extensive arguments were heard. The board members asked a number of questions, and commented on assertions made by plaintiff's attorney. In a two page, five paragraph document, the board of review announced that its decision was based on the record of the referee's hearing as well as the arguments and testimony presented directly to it.[3] The board made the following findings:

> [Plaintiff's] [r]eason for leaving work was to take care of his aunt, who was like a mother to him. Section 28-44-17(a)(3) of the Rhode Island Employment Act defines "good cause" as the

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1 The employer statement given to the Department of Labor and Training said only that the plaintiff "quit his job for family reasons. A relative was sick." Dept. of Labor and Training, Ex. 2, p. 3. The employer's witness testified that the income issue was not mentioned because when plaintiff submitted a written reason for his resignation – at the employer's request, the letter referred only to his sick aunt. Ref. Tr., p. 26.

2 The employer did provide a copy of the employee handbook and advised the board that as set out in that document, the plaintiff was not eligible for a leave of absence.

> need to take care of a member of the individual's immediate family due to illness or disability as defined by the Secretary of Labor. Section 28-44-17(a)(3)(i) defines "immediate family member" as a spouse, parents, mother-in-law and children under the age of eighteen (18). The claimant's aunt does not come within the term "immediate family member" as set forth in the statute.[4]

The board's decision was then appealed by filing a complaint in this court.

II. DISCUSSION

Although other issues were discussed at the referee's hearing and the referee's findings and conclusions mention several factors, the argument before the board and board's questions focused almost exclusively on the

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3 The board of review specifically noted that the "Findings of Fact and Conclusions contained in the Referee's Decision are incorporated into this Decision as if fully set forth herein."

4 The relevant provisions of §28-44-17(a) state:

> For the purposes of this section, "voluntarily leaving work without good cause" shall include:
>
> * * *
>
> (3) the need to take care [of] a member of the individual's immediate family due to illness or disability as defined by the Secretary of Labor . . . For the purposes of this provision, the following terms apply:
>
> (i) "immediate family member" means a spouse, parents, mother-in-law, father-in-law and children under the age of eighteen (18);

meaning of provisions in the statute which were the product of an amendment in 2010. At that time, the legislature modified § 28-44-17 to state that "good cause" under the law would include leaving work to care for an immediate family member, and defined "immediate family" to mean, *inter alia*, "parents." §28-44-17(a)(3) The decision of the board of review commented only on the proper interpretation of this section stating, "[t]he claimant's aunt does not come within the term 'immediate family member' as set forth in the statute."

The board's decision appears to be grounded solely on its interpretation of who is an "immediate family member" under the statute. But the basis for the decision is rendered less than limpid by the final sentence which incorporates the findings of fact and conclusions in the referee's decision "as if fully set forth herein."

A.

The Rhode Island Legislature did not define "parent' when it amended § 28-44-17, even though it did furnish definitions of other words and terms found in the new provisions. Plaintiff claims that "parent" is sufficiently broad to include persons acting "*in loco parentis*." Certainly, authority can be found to support this interpretation. Most dictionaries include persons acting as parents in describing those coming within the word's meaning: e.g.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002), p. 1641 ("a person standing in loco parentis although not a natural parent"), SHORTER OXFORD ENGLISH DICTIONARY, (5th Ed.) (2002), p. 2099 ("a person who holds the position or exercises the functions of such a parent[5], a protector"), RANDON HOUSE UNABRIDGED DICTIONARY, (2nd Ed.) (1993), p.1410 ("a protector or guardian"). Also, on at least one occasion, our supreme court has said that the actual connections between individuals would determine whether a person could assert parental rights. In Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000), the court found that the plaintiff could seek the rights available to a parent even though she had no biological connection with a child whom she helped raise.

The only information in the record about the relationship between him and his aunt was provided by the plaintiff. He testified that, "[s]he's like a mother and son because, um, when I brought my mother, she be sick, and my aunt checking with her to her house and I live with her all my life." Ref. Tr., p. 16. The employer has not challenged plaintiff's characterization of his close contacts and life-long association with his aunt.

Given the legislative intent in passing the Rhode Island Employment Act, which is discussed in greater detail later, the court might be persuaded

[5] The term "such a parent" refers to biological parent.

that based on frequent use of the term to describe persons who are not biologically related but act as a father or mother, the board erred when it construed "parent" as used in § 28-44-17(a)(3)(i) to exclude such individuals. However, it is not necessary to do so in this case, and the court will consider plaintiff's alternative reason supporting a broader interpretation of the statute.

B.

Plaintiff argues that because the state law refers to "care for a member of the individual's immediate family due to illness or disability *as defined by the Secretary of Labor*" (emphasis added), the court must consider how this phrase has been interpreted by the Secretary of Labor for the United States. Mr. Troche Soto further contends that under federal regulations, "parents" extends to those persons acting *in loco parentis*, even if not related to the individual providing care, and the Rhode Island law should be construed in the same manner. The Rhode Island Department of Labor and Training disagrees, and relies on the language of § 28-44-17(a)(3)(i) which says only "parents" without any reference to a person acting as a parent.

When the board heard arguments on this issue, it is clear that it determined that the statutory reference to the Secretary of Labor does not apply to the term "immediate family." Under the board's understanding of

the state law, the Secretary of Labor's definition would apply only to how the term "illness or disability" should be interpreted. During the hearing, the board chairman specifically noted that: "to me that doesn't read immediate family defined by the Secretary of Labor. It says illness or disability defined by the Secretary of Labor." Bd. Tr., p. 14.

A federal statute which became effective on November 6, 2009, provides funds which are given to the states to pay unemployment benefits, but requires that in order to be eligible to receive these monies, the state must have laws which furnish benefits to certain individuals. 42 U.S.C. § 1103. Subsection 1103(f) contains the heading, "Special transfers in fiscal 2009, 2010 and 2011 for modernization." It provides:

> (3) The State law of a State meets the requirements of this paragraph if such State law includes provisions to carry out at least 2 of the following subparagraphs:
>
> * * *
>
> (B) An individual shall not be disqualified from regular unemployment compensation for separating from employment if that separation is for any compelling family reason. For purposes of this subparagraph, the term "compelling family reason" means the following:
>
> * * *
>
> (ii) The illness or disability of a member of the individual's immediate family (as *those* terms are defined by the Secretary of Labor).

(Emphasis added.)

Both parties have assumed in their arguments, and the court agrees, that the reference to the "Secretary of Labor" in the Rhode Island statute means the Secretary of Labor for the United States. This state does not have a Secretary of Labor, but, rather, a Director of the Department of Labor and Training who is responsible for administering the state's Employment Security Act. Also, in light of the fact that the Rhode Island Legislature amended § 28-44-17 shortly after the federal law was passed requiring that individuals who left their employment to care for an ill or disabled person be eligible for benefits, it is reasonable to believe that the change was prompted by provisions of § 42 U.S.C. 1103(f)(3).

The federal statute uses the plural -- "those terms," when explaining what words will have the same meaning as identical language defined by the Secretary of Labor. In the congressional enactment there are three terms that precede this mention of the Secretary of Labor: "illness," "disability" and "immediate family," with the latter term being just before the Secretary is identified. Given this juxtaposition, if the provision were written in the singular, "this term," it should be construed to apply only to "immediate family." However, because the reference is in the plural it must include more than one category. It would require the court to ignore normal rules of

grammar to find that the reference should not include the term immediately before the reference to the secretary, but then apply it to those mentioned earlier in the sentence. The court rejects this tortured construction and rules that the federal law requires that "immediate family" must be interpreted as it is defined by the Secretary of Labor. The wording of the federal law applies to all three factors.

For some unexplained reason, the term "immediate family" was transposed with "illness or disability" when § 28-44-17 was amended. Instead of tracking the congressional enactment, "illness or disability of a member of the individual's immediate family," it reads, "a member of the individual's immediate family due to illness or disability." This difference affects the grammatical argument for the interpretation that "immediate family" must follow the Secretary of Labor's definition, but the use of plural -- "those terms," requires the statute to refer to multiple categories. A normal construction of the sentence would result in the reference to the Secretary of Labor applying to all three terms.

The federal labor law was passed to provide states with additional funds to deal with unemployment, and 42 U.S.C. § 1103(f) required some states to modernize their laws relating to eligibility for benefits. The thrust of the changes in Rhode Island, and probably in most states that amended

their laws, was to expand the class of claimants who qualified to receive unemployment benefits. It would be inconsistent with this latter purpose of the Congressional action to adopt the narrow construction urged by the Department of Labor and Training. If the Rhode Island law does not incorporate the Secretary of Labor's definition of "immediate family, the state may be disqualified from receiving the federal funds authorized under § 42 U.S.C. 1103. It is not clear whether the board considered this possible consequence when it fashioned its decision.

Rhode Island Supreme Court decisions furnish a second basis for applying the usual rules of grammar and thus construing the reference to the Secretary of Labor as applying to all three terms. In Harraka v. Board of Review of Department of Employment Security, 200 A.2d 595, 597 (R.I. 1964), one of the earliest examinations of § 28-44-17, the court said:

> The extent to which this limits 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 on 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.

See also, Murphy v. Fascio, 340A. 2d 137, 139 (R.I. 1975). It would be contrary to the express legislative purpose and a rejection of prior directives

from our supreme court to construe the provisions at issue here in the narrow manner suggested by the Department of Labor and Training.

Having accepted the view that the statute requires state employment officials to construe "immediate family" as it has been defined by the Secretary of Labor when considering cases under § 28-44-17, the court must look at those instances where the Secretary of Labor has addressed this matter. The Family and Medical Leave Act (FMLA), 29 U.S.C. § 2611, a statute directly related to the issue discussed here, defines parent as "the biological parent of an employee or an individual who stood *in loco parentis* to an employee when the employee was a son or daughter." 29 U.S.C § 2611(7).[6] In promulgating regulations under this statute, the secretary provided additional guidance, by defining parent in 29 C.F.R. § 825.122(b):

> (b) Parent. Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood *in loco parentis* to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents "in law."
>
> (c) Son or daughter. For purposes of FMLA . . .
>
> * * *
>
> (3) Person who are "*in loco parentis*" include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had

[6] A few sections later, 29 U.S.C. §2611(12) defines son or daughter, stating: "[t]he term 'son or daughter' means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*…"

> such a responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

In addition to this regulation, plaintiff introduced a statement issued by the U.S. Department of Labor explaining what the term *in loco parentis* means under the Family and Medical Leave Act. Fact Sheet #28C: FMLA leave to care for a parent with a serious health condition on the basis of an *in loco parentis* relationship. This fact sheet offers the following information:

> This Fact Sheet provides guidance on an employee's entitlement to FMLA leave to care for an individual who stood *in loco parentis* to the employee when the employee was a child.
>
> * * *
>
> **FMLA definition of "parent"**
> Under the FMLA, persons who are *in loco parentis* include those with day-to-day responsibilities to care for or financially support a child.
>
> * * *
>
> **What does *in loco parentis* mean under the FMLA?**
> *In loco parentis* is commonly understood to refer to a relationship in which a person has put himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child with whom he or she has no legal or biological connection.
>
> * * *
>
> **Examples of *in loco parentis***

> Examples of situations in which FMLA leave to care for a parent may be based on an *in loco parentis* relationship include:
>
> - An employee may take leave to care for his aunt with a serious health condition, if the aunt was responsible for his day-to-day care when he was a child.

The U.S. Department of Labor publication makes it clear that plaintiff's relationship with his aunt would qualify her as an "immediate family member" under federal law. This statement from the labor department can be considered a further explanation of the definitions found in 29 C.F.R. § 2611.

Compelling evidence shows that applying the Secretary of Labor's definition of "immediate family" to the circumstances in this case, must result in finding that the plaintiff's aunt is a member of his "immediate family." The board erred as a matter of law in failing to do this, and, therefore, its decision cannot stand. If there were no other issues presented in this appeal, a simple reversal of the board's decision would be appropriate. However, because the board's decision incorporates the findings and conclusions of the referee, further discussion is required.

C.

The referee's decision comments on a number of factors that were not mentioned at the board hearing nor addressed in its written decision. The referee states that "it is undisputed that the claimant resided with his aunt

who required assistance due to a variety of medical conditions". (Emphasis added.) However, later in his opinion, the referee notes that "there is no evidence to support required medical care beyond what the social service agency hired the claimant to perform." He further stated that:

> Absent evidence that the aunt's medical condition required additional claimant care, in fact her condition improved enough that several months later the assessment found her able to function in most areas of daily living, the claimant had the reasonable alternative of requesting a temporary leave to give him time to address his personal concerns.

1.

At least one of the facts cited by the referee to support this portion of his decision is directly contradicted by the record. At the referee's hearing, the employer asked plaintiff whether he requested a leave of absence, and referred to an employee handbook. Mr. Toche Soto's attorney asked him if he was aware he could ask for a temporary leave rather that quitting and he said "no." Ref. Tr., pp. 21-22. While this exchange presented to the referee suggests that a leave of absence was available to plaintiff, later, at the board

hearing, the employer specifically stated that the plaintiff did not have sufficient time in his job to qualify for a leave of absence. Bd. Tr., p. 13.[7] Therefore, the complete record shows that the plaintiff did not have this option.

2.

Another factor which is not discussed in the board's opinion but which appears to have been given significant weight by the referee in recording his findings and conclusions, is the extent of plaintiff's aunt's disability and the amount of care required to meet her needs. The referee found that:

> there is no evidence to support required medical care beyond what the social service agency hired the claimant to perform. . . Absent evidence that the aunt's medical condition required additional claimant care, in fact her condition improved enough that several months later the assessment found her able to function in most areas of daily living. . . .

However, the record includes unopposed testimony that the woman had "a kidney problem" and had dialysis three times a week. Ref. Tr., p, 13, Cl. Ex. 1. A letter from the medical care provider stated that the aunt "has a medical history significant for diabetes, reflux, hypertension, and chronic renal

[7] In his initial submission to the Department of Labor and Training when he applied for benefits, the plaintiff explained that he did not ask for "a leave or (sic) absence because I was only five months with the company and I knew they would not give it to me." Ex. D 1, p. A.

failure. She also suffers from end stage renal disease and has been receiving maintenance hemodialysis treatments since 11/7/07." Ex. C1. Plaintiff explained that his aunt could not see well enough to do things.[8] He said: "I do everything for her, I cook, clean, I wash her clothes. Do everything, give the medication, call the doctor, make the appointment. . . ." Ref. Tr., p. 15.

The Rhode Island statute defines both "illness" and "disability in general terms. Subsection (a)(3)(ii) defines "illness" as meaning "a verified illness which necessitates the care of the ill person for a period of time longer than the employer is willing to grant leave." Subsection (a)(3)(iii) describes "disability" as "all types of verified disabilities, including mental and physical disabilities, permanent and temporary disabilities, and partial and total disabilities." Neither party has argued that the condition of plaintiff's aunt is not covered by the statute, and this was not raised at the board hearing.

These definitions in § 28-44-17 are consistent with statements by the Secretary of Labor. The court's search for a definition in the FMLA, which is the federal statute directly related to the statute considered here, failed to

[8] A letter was submitted at the board hearing which said the aunt's vision, after an operation to correct a vitreous hemorrhage in April, was 20/50 in one eye, and 20/100 in the other.

find an explanation for this term. The statute does discuss "serious health condition" in a several places, and defines it as: "an illness, injury, impairment, or physical or mental condition that involves – (A) inpatient care in a hospital, hospice, or residential medical care facility, or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

It is not clear that the referee's ruling was based on a finding that the medical condition of plaintiff's aunt was not serious enough to be considered an "illness" or "disability" under state law. And the board never mentioned this potential issue during the hearing or in its written opinion. The tone of the board's decision suggests that it assumed that the aunt's medical problems were serious enough to meet the definitions in § 28-44-17.

3.

The referee's decision states: "[t]he credible testimony supports that the claimant, based on the combined earnings, may have [been] faced with either a reduction in the subsidy to his housing or potentially required to relocate." The opinion does not include a finding that this is the reason he left his job, but merely that he might have a housing problem. It appears that this question was never properly identified for the board's consideration, and

it was not mentioned by either party when they appeared before the board. In fact, the board's decision states, "[h]is reason for leaving work was to take care of his aunt."

On the basis of the record in this case, it is difficult to conclude that the board even considered that part of the referee's decision dealing with possible housing issues as being the reason plaintiff quit his job.

III. CONCLUSION

The court has determined that the board of review erred in finding that the term "immediate family" did not include persons acting *in loco parentis*. Also, it is unclear whether other issues raised in this case were considered by the board. The decision of the board is reversed, and the matter is remanded for reconsideration of the remaining issues noted in this opinion.