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

Crystal O'Dowd	:	
	:	
v.	:	**A.A. No. 12 - 101**
	:	
Dept. of Labor & 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 AFFIRMED.

Entered as an Order of this Court at Providence on this 8th day of June, 2012.

By Order:

___/s/_____
Melvin Enright
Acting 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 the instant complaint Ms. Crystal O'Dowd urges that the Board of Review of the Department of Labor and Training erred when it held that she was not entitled to receive unemployment benefits. 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 of the Board in this matter should be affirmed; I so recommend.

FACTS & TRAVEL OF THE CASE

Ms. Crystal O'Dowd worked as a shift leader for S & D Park, LLC at one

of its Dunkin Donuts stores for six months until June 6, 2011, at which time a leave of absence was necessitated by her pregnancy. After her child was born she sought reinstatement but, for reasons that have been in dispute, she was not put to work. She filed a new claim for employment security benefits and on December 13, 2011 the Director determined that she was eligible for benefits. The employer appealed from this decision and Referee Williams Enos held a hearing on the matter on February 1, 2012. Two employer representatives appeared and testified — the claimant did not. In his decision, the Referee made the following Findings of Fact:

> Claimant worked as a Shift Leader at S & D Park, LLC for six months last on June 6, 2011. The employer testified that the claimant took a leave of absence to have a baby and brought in a doctor's note dated June 6, 2011 stating she would be out about eight weeks or until delivery. The employer testified that the claimant did keep in contact and when she was ready to return to work the employer did not have a position in the store that she had worked at but did instruct her to contact the general manager because they have five locations in the same general area but she refused to do so. The employer testified that the claimant was a good worker and that they would have liked to find a position that would have worked for both parties.

Referee's Decision, February 3, 2012, at 1. Based on these findings, the Referee concluded that her failure to communicate constituted a leaving without good cause within the meaning of Gen. Laws 1956 § 28-44-17:

> * * *
> Undisputed testimony and evidence offered that the claimant did not contact the general manager to find a position in another

> location. Based on this conclusion, I find that claimant left work voluntarily without good cause within the meaning of Section 28-44-17 of the Rhode Island Employment Security Act and is not entitled to benefits.

Referee's Decision, February 3, 2012, at 2. Accordingly, Referee Enos's decision denied further benefits to Ms O'Dowd.

Claimant filed an appeal and the matter was considered by the Board of Review. In a written opinion issued on March 30, 2012, a majority of the members of the Board of Review held that the decision of the Referee was a proper adjudication of the facts and the law applicable thereto. Accordingly, the decision of the Referee was affirmed. Thereafter, on April 30, 2012, the claimant filed a complaint for judicial review in the Sixth Division District Court. This matter has been referred to me for the making of Findings and Recommendations pursuant to section 8-8-8.1 of the General Laws.

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.

The court, as stated above, rejected the notion that the termination must be "under compulsion" or that the reason therefore must be of a "compelling nature."

Finally, it is well-settled that a worker who leaves his position voluntarily, in order to be eligible for unemployment benefits, bears the burden of proving that he did so for good cause within the meaning of section 28-44-17.

STANDARD OF REVIEW

The standard of review is provided by R.I. Gen. Laws § 42-35-15(g), a section of the state Administrative Procedures Act, which provides as follows:

> **42-35-15. Judicial review of contested cases.**
> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Thus, on questions of fact, the District Court "* * * may not substitute its judgment for that of the agency and must affirm the decision of the agency unless

its findings are 'clearly erroneous.' "[1] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[2] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[3]

The Supreme Court of Rhode Island recognized in Harraka, 98 R.I. at 200, 200 A.2d at 597 (1964) that a liberal interpretation shall be utilized in construing and applying the Employment Security Act:

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

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1 Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing R.I. GEN. LAWS § 42-35-15(g)(5).

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

3 Cahoone v. Bd. of Review of Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968). Also D'Ambra v. Bd. of Review, Dept of

ISSUE

The issue before the Court is whether the decision of the Board of Review was supported by reliable, probative, and substantial evidence in the record or whether or not it was clearly erroneous or affected by error of law. More precisely, was claimant disqualified from receiving unemployment benefits because she left work without good cause pursuant to section 28-44-17?

ANALYSIS

The Board of Review found Ms. O'Dowd quit her position because she failed to contact the general manager to arrange for work at a different location. In so finding the Board could rely on the testimony of the employer's representative, Mr. Sam Medeiros, who testified at the hearing before Referee Enos that in October of 2011 the Claimant notified him that she was ready to return to work. Referee Hearing Transcript, at 6. He told her — in the course of a text conversation — that he had no work for her but that she should call the general manager to see if he had work for her in another store. Referee Hearing Transcript, at 7, 9. Indeed, the general manager was with Mr. Medeiros and offered to take her call. Referee Hearing Transcript, at 8. Mr. Medeiros conceded that the conversation was not altogether civil. Referee Hearing Transcript, at 7. In conclusion, he praised her ability and indicated he did not want to lose her from

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Emp. Security, 517 A.2d 1039 (R.I. 1986).

his workforce. Referee Hearing Transcript, at 14.

Mr. Tetreault, the general manager, professed that he had a desire to accommodate the Claimant. Referee Hearing Transcript, at 10-11. He specifically said that they had the ability to make available an evening shift — which he called "mother's hours" — at his four stores, which he said were all near the Park Avenue Cranston location where she had previously worked.

As stated above, Ms. O'Dowd did not testify before the Referee.

The principle that an employer has a right to expect that its employees will maintain communication when on Family Leave or TDI has been recognized by this Court on a number of occasions. See Sanchez v. Department of Labor and Training, Board of Review, A.A. No. 05-80, (Dist.Ct. 1/24/06)(Employee collecting TDI recipient 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). Accordingly, Ms. O'Dowd's failure to contact Mr. Tetreault to resume her employment may properly be deemed to constitute a *de facto* quitting.

In dissent, the Member Representing Labor indicated that Claimant left work for good cause. I infer that he is intimating that she went out on her leave for good cause. While this is certainly true, I view the case differently. I see her *de facto* quitting occurring when she did not fully pursue the resumption of her work.

We must remember, she did not work for a location, she worked for a company, which had multiple locations.

As stated above, pursuant to the applicable standard of review, this Court is not authorized to substitute its judgment for that of the Board of Review. See Gen. Laws § 42-35-15(g), supra at 5 and Guarino, supra at 6, fn.1. The scope of judicial review by the District Court is also limited by General Laws section 28-44-54 which, in pertinent part, provides:

> **28-44-54. Scope of judicial review – Additional Evidence – Precedence of proceedings. –** 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.

Accordingly, the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated her employment by failing to contact her employer to resume her employment is supported by the substantial evidence of record and must be affirmed.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review was not affected by error of law. Gen. Laws 1956 § 42-35-15(g)(3),(4). Further, it was not clearly 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 AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

JUNE 8, 2012