STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. **DISTRICT COURT**

SIXTH DIVISION

Robert Roberge	:	
	:	
v.	:	**A.A. No. 12 - 123**
	:	
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 AFFIRMED except the order of repayment is REVERSED.

Entered as an Order of this Honorable Court at Providence on this 20th day of September, 2012.

By Order:

_____/s/_____
Stephen C. Waluk
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 this case Mr. Robert Roberge urges that the Board of Review of the Department of Labor and Training erred when it held that he was ineligible to receive employment security benefits because he quit 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 denying benefits to Mr. Roberge is supported by the facts of the case and the

applicable law and should be affirmed; accordingly, I so recommend.

FACTS & TRAVEL OF THE CASE

Mr. Robert Roberge worked for Modern Concrete LLC as a concrete finisher for two years until July 7, 2011, when he quit. He applied for unemployment benefits (re-opening a prior claim) but the Director deemed him ineligible because he had quit without good cause within the meaning of Gen. Laws 1956 § 28-44-17.[1] He took an appeal and a hearing was held before Referee Carol A. Gibson on March 8, 2012. In her decision, also dated March 8, 2012, the Referee found the following facts:

> 2. FINDINGS OF FACT
>
> The claimant had worked for the employer for two years as a concrete finisher through July 7, 2011. The claimant indicates that during the last seven months of his employment he had issues with a co-worker. The claimant states this co-worker created an unsafe work environment and that he did not feel comfortable working with this employee. The claimant states that this co-worker has prior criminal charges on their record. The claimant indicated that some issues were addressed with the employer but he does state that he did not address all of his concerns with the employer. The claimant did not work with this individual on a daily basis. They worked together based on the needs of the job. The claimant states that on the last day he was

[1] The Director actually issued two decisions — covering different benefit years and the amounts of overpayment addressed, but substantively identical. Likewise, the Referee and the Board of Review issued two decisions. Nevertheless, to avoid confusion, at each level, I shall refer to these decisions in the singular.

> working alone on a worksite with this co-worker. The claimant states the co-worker made a verbal threat against him. The claimant made a two minute cell phone call to the employer indicating he was leaving the worksite and he had no further contact with the employer. The claimant did not return to work after that date to attempt to address and resolve his concerns with the employer. The claimant did not file charges or a complaint against his co-worker. The employer states they were aware of minor issues between the two employees but they were not made aware of specific incidents or threats made against the claimant.

Decision of Referee, March 8, 2012, at 1. Based on the foregoing facts, the Referee — after quoting extensively from Gen. Laws 1956 § 28-44-17 — came to the following conclusions:

> In order to establish that he had good cause for leaving the job, the claimant must show that the work had become unsuitable or that he was left with no reasonable alternative but to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant.
>
> In this case, the claimant has not met this burden. The record is void of sufficient evidence to indicate that either of these situations existed. The claimant left the job when he walked off the worksite as he felt threatened by his co-worker. The claimant did not attempt to return to work to address and resolve these issues with the employer. It is determined that the claimant's leaving in these circumstances is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, March 8, 2012, at 2. Based on this reasoning, Referee Gibson held that Claimant Roberge voluntarily terminated without good cause

within the meaning of Gen. Laws 1956 § 28-44-17.

Claimant appealed and the Board of Review reviewed Mr. Roberge's case. On May 3, 2012 a majority of the Board (the Chairman and the member representing Industry) issued an opinion finding that the Decision of the Referee was a proper adjudication of the facts and the law applicable thereto. The Member Representing Labor filed a dissenting opinion. Accordingly, the decision of the Referee was affirmed. Finally, on May 30, 2012, Mr. Roberge filed a complaint for judicial review in the Sixth Division District Court.

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; Gen. Laws 1956 § 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.

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.' "[2] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[3] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[4]

The Supreme Court of Rhode Island recognized in Harraka, supra page 4, 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

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2 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).

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

4 Cahoone v. Bd. 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).

> 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.

ANALYSIS

In this case, the Board determined that claimant left his job without good cause within the meaning of § 28-44-17 of the Rhode Island Employment Security Act. It is uncontested that claimant quit his job. The only question is whether he did so with good cause. I conclude that the Referee's decision that he quit without good cause is not clearly erroneous in view of the reliable, probative, and substantial evidence of record.

1. Review of the Factual Record.

In denying benefits in this case the Referee could rely upon the testimony of the witnesses presented before her — Claimant Roberge and Denise Sousa, Office Manager for the employer — Modern Concrete.

The Claimant testified first. Referee Hearing Transcript, at 10 et seq. He indicated he had been a full-time employee for Modern Concrete for about two years as a concrete finisher. Referee Hearing Transcript, at 11. He then told the Referee he left Modern Concrete — although "he didn't want to" — because of a "situation" that was occurring, which was "never addressed," and about which he "had multiple conversations with Mr. Sousa." Id. Mr. Sousa was the

firm's owner. Referee Hearing Transcript, at 17. He explained that he felt threatened by a co-worker, Colin Davis. Referee Hearing Transcript, at 12. He stated that Mr. Sousa "knew that me and him did not work well together because of his behavior." Id. Nevertheless, they often were required to work together because Claimant was the only worker with a driver's license — which was necessary to drive to job sites. Referee Hearing Transcript, at 13.

After this background was provided, Mr. Roberge addressed the events of July 7, 2011. He alleged that Mr. Davis "verbally threatened me of physical abuse." Referee Hearing Transcript, at 15. To be precise, at 12:45 on July 7th, while working in a small basement — "He said if I didn't shut the F up, he'd knock me out." Referee Hearing Transcript, at 16. He viewed this remark as the "final straw." Id. At this point, he called the employer and notified him of what happened. Referee Hearing Transcript, at 17. He said that Mr. Sousa didn't say anything, perhaps because his allegations were "unexpected." Referee Hearing Transcript, at 18. He then left the job site. Referee Hearing Transcript, at 17.

He did not go to the office and never returned to work, because Mr. Sousa never called him back; because of this, he "felt" Mr. Sousa took Mr. Davis' side. Referee Hearing Transcript, at 18. But, he conceded, Mr. Sousa

never said that. Referee Hearing Transcript, at 19. Mr. Roberge did not report the incident to police authorities for possible prosecution. Referee Hearing Transcript, at 20-21.[5]

Mr. Roberge indicated that, in general, Mr. Davis was not a safety-minded worker. Referee Hearing Transcript, at 21-22. He indicated these matters had been reported orally to Mr. Sousa. Referee Hearing Transcript, at 22-23. In fact, Mr. Roberge testified that he had been injured as a result of Mr. Davis' conduct. Referee Hearing Transcript, at 22.

Denise Sousa testified on behalf of the firm and her husband. Referee Hearing Transcript, at 28. She denied that Claimant had ever informed the firm that he felt threatened. Referee Hearing Transcript, at 29. In fact, she says that her husband was very upset that Claimant had walked off the job. Referee Hearing Transcript, at 31. She indicated that — if they had been informed — the issue of the alleged threat would have been addressed. Referee Hearing Transcript, at 32. On this question, she drew a distinction between workers not getting along and a threat. Id. And while Mrs. Sousa indicated that the workers were paired up based on their skills, she did confirm that Mr. Roberge had

[5] However, Mr. Roberge did present internet printouts of Mr. Davis' criminal contacts with the District Court. Referee Hearing Transcript, at 19.

complained that Mr. Davis had a "big mouth, things like that." Referee Hearing Transcript, at 35.

2. Applicable Principles of Law.

As stated above, the Board found that Mr. Roberge's concerns did not provide him with good cause to quit. Of course, the principle that concerns regarding one's safety in the workplace may provide good cause to quit under section 28-44-17 has been recognized by the Board of Review and this Court. See Houle v. Department of Employment and Training Board of Review, A.A. 95-45, (Dist.Ct.11/22/95)(DeRobbio, C.J.)(Truck driver had good cause to quit based on documented problems with brakes). Often, however, such claims are denied based on a failure of proof regarding the extent and immediacy of the safety concerns alleged; additionally, prior rulings have indicated that a worker with a safety concern must give his employer a chance to ameliorate the problem before quitting, or suffer disqualification from the receipt of unemployment benefits on the theory that his unemployment was — at least potentially — avoidable. Therefore, the issue before the Court is whether the Board's finding that Mr. Roberge failed to sustain his burden of proving that he quit his position at Modern Concrete with good cause — under circumstances which were effectively beyond his control.

3. Application of the Law to the Facts of this Case.

To analyze this case we need not resolve difficult issues of fact and credibility. To the contrary, I believe that, even if we analyze the case using only Claimant's version of events, we must conclude that his disqualification is well-supported in fact and law.

Claimant testified that he had had a series of difficulties with Mr. Davis. But, none of these previous issues was of the seriousness of the threat which he alleges was uttered to him in July of 2011. None involved allegations of criminal conduct. This was unprecedented behavior on Mr. Davis' part, different in kind as well as degree from that which had been seen before.

Reviewing the incident, one may not be able to fault his immediate departure from the job site, but his failure to communicate with Mr.Sousa later that day (or the next) in an attempt to achieve a safe working environment is, in my view, irrational. His explanation — that he did not call Mr. Sousa because he had asked Mr. Sousa to call him — is thoroughly unsatisfactory, in light of the fact that he had only spoken to Mr. Sousa briefly, in a phone call conveying his rather alarming allegation. And his assumption that Mr. Sousa took Mr. Davis' side was without a sound basis in fact, since Mr. Sousa had never made any such comment. All in all, I conclude his conduct — i.e.,

quitting without extending his employer a fair chance to remedy the situation was precipitous and unjustified.

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.[6] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[7] Accordingly, the Board's decision that claimant voluntarily terminated his employment at Modern Concrete without good cause within the meaning of section 17 is supported by the evidence of record and must be affirmed.

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

7 Cahoone, supra n. 6, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Bd. of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I. 1986). See also Gen. Laws § 42-35-15(g), supra p. 6 and Guarino, supra p. 7, fn. 2.

REPAYMENT

Finally, Claimant was ordered to repay over $3,700.00 by the Director. In her decision, issued on March 8, 2012, the Referee made the following Findings of Fact on the issue of repayment:

> **2. FINDINGS OF FACT:**
>
> The record indicates the claimant filed a claim for benefits and he did not indicate his employment with this employer or the reason for his separation. The claimant states that he had subsequent employment with a new employer and he did not believe he was required to inform the Department that he was separated from this employer. As a result, the claimant received benefits totaling $3053.00.

Referee's Decision, March 8, 2012, at 2. Based on these findings the Referee arrived at the following conclusion on the issue of claimant repayment:

> **3. CONCLUSION:**
>
> * * *
> The claimant filed his claim for Employment Security Benefits without disclosing that he was employed with this employer and that he had voluntarily left his job. Based on the claimant's failure to disclose the information regarding his employment and separation from employment, he received Employment Security Benefits during a period of disqualification. The claimant is at fault for the overpayment and subject to make restitution in this case.

Referee's Decision, March 8, 2012, at 3. Accordingly, the Referee found claimant both overpaid and at fault for the overpayment.

In so finding, the Referee applied 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. (Emphasis added).

Thus, repayment is not mandated in every instance where a claimant has been incorrectly paid, but only where the claimant was at fault and where recovery would not defeat the purposes of the Act. In this case the Referee found fault — not from any affirmative misstatements but from an omission — because he did not inform the Department, when he was laid off from Set In Stone, that he had previously quit his position at Modern Concrete. Referee Hearing Decision, March 8, 2012, at 3.

On this issue Mr. Roberge testified that he filed for benefits by telephone and that he was never asked about prior employment. Referee Hearing Transcript, at 25-26. He indicated that he did not realize he did not have enough time in to collect from Set In Stone and so, he did not realize the relevancy of his prior employment at Modern Concrete to the claim he was making. Referee Hearing Transcript, at 25-26. To his testimony no rebuttal evidence or testimony was submitted — by the Department or the employer; thus, on this question, Mr. Roberge's testimony was entirely uncontradicted.

Accordingly, we have a finding of fault in this case unsupported by any evidence of deceit on the part of Mr. Roberge. I find no other circumstances which could fairly be deemed "fault" within the meaning of the repayment statute. Accordingly, I believe the order of repayment is clearly erroneous.

CONCLUSION

Upon careful review of the evidence, I recommend that this Court find that the decision of the Board of Review on the issue of eligibility was not affected by error of law. GEN. LAWS 1956 § 42-35-15(G)(3),(4). Further, the decision 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 except that the order of repayment is REVERSED.

/s/
Joseph P. Ippolito
MAGISTRATE

SEPTEMBER 20, 2012