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

Sally Davidson	:	
	:	
v.	:	**A.A. No. 12 - 182**
	:	
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 AND REMANDED for further proceedings consistent with the attached opinion.

Entered as an Order of this Honorable Court at Providence on this 25th day of October, 2012.

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 Ms. Sally Davidson urges that the Board of Review of the Department of Labor & Training erred when it held that Ms. Davidson was not entitled to receive employment security benefits because she left her 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 General Laws 1956 § 28-44-52. This matter has been referred to me for the making of findings and recommendations pursuant to General 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 Ms. Davidson because she quit without good cause is not

supported by the facts of record and the applicable law. As I shall explain, I believe the case would have been analyzed more properly on a theory of a termination for proved misconduct. And so, in addition to recommending that the decision of the Board of Review be set aside, I shall also recommend that the matter be remanded for further proceedings which shall consider whether Ms. Davidson should have been disqualified for proved misconduct.

I. FACTS & TRAVEL OF THE CASE

Ms. Sally Davidson was employed by the medical office of Dr. Jeffrey Wishik as a nurse practitioner until January 26, 2012. She applied for unemployment benefits but the Director deemed her ineligible because she resigned without good cause within the meaning of Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and Referee Gunter Vukic held a hearing on the matter on June 12, 2012. Ms. Davidson appeared, as did the employer, Dr. Wishik, and his wife, who is the office manager. In his decision, issued on June 14, 2012, the Referee made the following Findings of Fact regarding claimant's separation:

> **2. FINDINGS OF FACT:**
> * * *
> The claimant was a nurse practitioner with a Masters of Science degree licensed in Rhode Island and Massachusetts. On or about January 16, 2012, the parties met. The claimant was provided with a type written 2012 performance goals and job duties list. The claimant took issue with several changes. Claimant refused to comply with the employer's 15 minute routine follow-up visit change and directive to refer patients for computerized testing. The claimant said that she was burnt out with her part time employment and was in the process of finalizing a new job with Epoch Sleep Centers. Claimant confirmed

her intention to leave the practice in e-mails sent on and prior to January 26, 2012.

January 26, 2012, during the meeting, claimant indicated that the employer was petty, confirmed her refusal to comply and her intention to leave. Unprofessional remarks directed at the employer during the meeting resulted in the immediate acceptance of the claimant's resignation in spite of the claimant's desire to provide a multi-week notice. Claimant filed online under the layoff/lack of work selection and began receiving benefits.

Referee's Decision, June 14, 2012, at page 1. Based on these findings — and after quoting extensively from Gen. Laws 1956 § 28-44-17 — the Referee formed the following conclusions on the issue of claimant's separation:

3. CONCLUSION:

* * *

In order to show good cause for leaving employment, the claimant must show the work had become unsuitable or that the claimant was left with no reasonable alternative but to resign. The burden of proof rests solely on the claimant. In this case the claimant has not sustained this burden. Insufficient testimony and no evidence has been provided to support either of the above conditions.

Nothing in the 2012 Performance Goals and changes in Job Duties made the claimant's job unsuitable nor was she left with no reasonable alternative. The claimant could comply but refused to accommodate several reasonable changes the employer was instituting in his practice that included having the claimant limit her work to that within what the doctor defined as the scope of his medical practice. The refusal was accompanied by her announcement that she was finalizing her Epoch Sleep Centers employment contract and planned to transition to her new job over a period of time. Her intention to leave was publicized to others serviced/associated with her employer.

On her last day of work the claimant punctuated her refusal to work under her employer's direction by insulting the doctor and his wife. The immediate acceptance of resignation (sic) does not constitute a discharge, even less a layoff for lack of work. The credible testimony

> and evidence support the employer intention of continued claimant employment. This is weighed against the claimant's pronouncement of her leaving in the future to work at Epoch Sleep Centers, future date clearly being advanced by her as evidenced by her emails.
>
> The claimant resigned without good cause and prior to having a confirmed job offer.

Referee's Decision, June 14, 2012, at page 2. Thus, Referee Vukic found claimant to be disqualified from receiving benefits because she left work without good cause.

Claimant filed an appeal and the matter was reviewed on its merits by the Board of Review. On August 30, 2012, the Board of Review unanimously issued a decision which found 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. Finally, on September 20, 2012, the Claimant filed a complaint for judicial review in the Sixth Division District Court.

II. 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.

III. 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, cited supra page 5, 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, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

IV. 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 properly disqualified from receiving unemployment benefits because she abandoned her position without good cause pursuant to section 28-44-17?

V. ANALYSIS

In this case, the parties disagree as to whether the Claimant quit or was fired. Indeed, the precise facts of the dissolution of the employment relationship that had existed between Dr. Wishik and his nurse practitioner are in great dispute. However, they do agree on many of the particulars of the tensions that were growing between them — disagreements which ultimately became irreconcilable.

For instance, they agree that for some time they had been disputing the use of certain testing equipment. Referee Hearing Transcript, at 49. Then, on January 24, 2012 she was given a list of changes the doctor intended to institute — designated "Performance Goals"; they agreed to discuss the items on the list on January 26, 2012. Referee Hearing Transcript, at 30.

As stated above, the Board — relying on the decision of the Referee — made two fundamental findings: (1) that Claimant quit, and (2) that she did not have good cause to quit within the meaning of section 17. While I do not disagree with the latter

finding, I have concluded the former is without support in this record. We shall address these findings in reverse order.

A. Good Cause to Quit.

1. Factual Record.

Because I believe it can be readily handled, I shall begin by reviewing the propriety of the Referee's "good cause" finding, following which I shall address the preliminary issue of whether Claimant quit.

The record contains abundant evidence of Claimant's displeasure with the changes in her work procedures that Dr. Wishik enumerated he would be instituting. Referee Hearing Transcript, at 13 et seq. She had reservations about the doctor's intention to shorten her follow-up appointments with ADD patients from thirty minutes to fifteen minutes, and explained why — from the holistic perspective of a nurse practitioner — she felt a longer appointment was appropriate. Referee Hearing Transcript, at 14-15, 17-18. She indicated she was concerned this practice could jeopardize her license as a nurse practitioner. Referee Hearing Transcript, at 25-26.

And she explained that she had "issues" with his plans to require her to refer patients for "quotient testing." Referee Hearing Transcript, at 19-20. Finally, and on a personal note, she objected to changes in her work schedule. Referee Hearing Transcript, at 21, 54-55. These were the three items on the list to which she objected

most strenuously.[4] In fact, she never agreed to institute the changes the doctor listed. Referee Hearing Transcript, at 57.

2. Sufficiency of the Evidence.

A reading of the transcript leaves no doubt that the changes which the doctor proposed instituting engendered opposition in Ms. Davidson. She freely conceded she was argumentative with the doctor and frankly admitted using graphic language to the doctor (and his wife). Referee Hearing Transcript, at 44. However, she never showed that the implementation of any of Dr. Wishik's instructions would have required her to act illegally or unprofessionally. Cf. Powell v. Department of Employment Security, Board of Review, 477 A.2d 93, 97 (R.I. 1984)(public relations officer had good cause to quit where his superior asked him to prepare a misleading press release). Accordingly, I must agree that these changes did not provide Claimant with good cause to quit.

B. Whether Claimant Quit.

1. Factual Record.

At this juncture, I shall recount the evidence pertinent to the first issue — viz., whether she quit or was fired. She repeatedly and emphatically denied she quit. Referee Hearing Transcript, at 23, 26, 28, 30, 54, and 56. She maintained that she

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[4] The strength of her opposition can be seen in the annotations she made to the copy of the list given to her by the doctor. Referee Hearing Transcript, at 35-37. On the other hand, she had no problem with other particulars of the doctor's agenda. Referee Hearing Transcript, at 22-23.

was asked to leave at about 5:30 p.m. on January 26, 2012. Referee Hearing Transcript, at 12, 30, and 35. She commented that she was never told she quit. Referee Hearing Transcript, at 34.

Of course, the Claimant conceded that she told Dr. Wishik that she was seeking a new position. Referee Hearing Transcript, at 46. Perhaps indiscreetly, she informed the doctor where she hoped to be working — at Epic Sleep Center. Referee Hearing Transcript, at 46-47, 54. In what may be fairly viewed as further evidence of intention to leave, she volunteered to help him find a new nurse practitioner. Referee Hearing Transcript, at 56. When asked about e-mails she had sent to patients indicating she would be leaving, she said she felt she was going to be asked to leave by Dr. Wishik if they failed to come to an agreement. Referee Hearing Transcript, at 26.

According to the doctor, Ms. Davidson told him she was "going to" finalize a contract with her new employer shortly and that she "anticipated" transitioning to the new position over the course of two months. Referee Hearing Transcript, at 46, 47. The doctor confirmed that Claimant was asked to leave after she used inappropriate language. Referee Hearing Transcript, at 44, 51. She inquired whether she would be paid for her "last week of work." Referee Hearing Transcript, at 51.

2. Sufficiency of the Evidence.

The Director held that the Claimant quit. See Director's Decision, April 26, 2012. In doing so he seemed to endorse the employer's theory — viz., that she quit

by failing to agree to institute the changes the doctor had prescribed. Id. This theory was not adopted by the Referee — and rightly so.

The theory that one can "quit" by non-expressive conduct is rather limited. District Court case precedents have recognized "constructive" or "de facto" quits in cases where the Claimant failed to appear for work without explanation and, in some cases, where the claimant walked off the job. This theory has not been applied in cases such as the one before the Court where the Claimant is alleged to have failed to followed instructions. See Cogean v. Department of Employment and Training, Board of Review, 658 A.2d 528, 530 (R.I. 1995)(Court rejects de facto quit theory in case where medical technician who refused to distribute Registered Nurse's medications because she needed to take her own medicine — for diabetes — was told to "punch out" by Director of Nursing). Instead, such allegations have been viewed as potential insubordination and have been adjudicated under section 28-44-18, which bars benefits to those who have been fired for misconduct. E.g., Cogean, id.

And so, to reiterate, Referee Vukic was right to reject a constructive quit theory in this case. Instead, he apparently found that claimant quit her position expressly. If supported by the record, such a finding would constitute a perfectly appropriate disposition of the instant case. Unfortunately, I feel the evidence of record does not support this finding.

In essence, the Referee concluded that Claimant had quit because she notified her employer that she expected to be leaving. To be precise, he made the following pertinent conclusions — (1) that Ms. Davidson "was finalizing her Epoch Sleep Center employment" (2) that Claimant "planned to transition to her new job," and (3) "Her intention to leave was publicized to others." Referee's Decision, at 2 (Emphasis added). But these conclusions, which are supported by the record,[5] are not statements of historical fact; they are conditional findings of Claimant's subjective expectations about future events. From my reading of the record, it does not appear that she ever portrayed her new position as a fait accompli. All in all, it seems to me that the Referee misread Ms. Davidson's statements of an intention to leave with an express resignation.

I believe penalizing an employee for revealing he or she is seeking a new job would be fundamentally unfair and run afoul of a practical principle of unemployment law — viz., that one who is subjected to problems at work that do

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[5] The doctor testified that she told him she was "going to" finalize her new employment contract; he also quoted Ms. Davidson as saying she "anticipated" transitioning to her new position; finally, a pair of e-mails entered as exhibits confirm that she told two patients she would be leaving. See Director's Exhibit D1 at 11-12.

At this juncture I may note that the Referee drew an additional inference from the e-mails that I do not believe is well-founded — that January 26th would be her last day. Id.

not arise to an immediate compulsion to leave must seek and secure a new position before quitting.[6] We cannot hold seeking new work against unhappy employees.

In my view, it is clear that the friction between Doctor Wishik and Nurse Davidson was coming to a boil. By the end of the meeting, she may well have submitted a formal resignation; in the alternative, he may have fired her for insubordination. But before that happened, she was discharged based on her conduct. I am not unmindful of the conduct alleged, both as to demeanor and the refusal of orders. And so, I believe this case should be analyzed under section 18.

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.[7] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[8] Accordingly,

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[6] Indeed, in this case the Referee specifically found that Ms. Davidson quit without having obtained a new position. Referee's Decision, at 2.

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

[8] Cahoone, supra n. 7, 104 R.I. at 506, 246 A.2d at 215 (1968). See also D'Ambra v. Board of Review, Dept. of Employment Security, 517 A.2d 1039, 1041 (R.I.

the Board's decision (adopting the finding of the Referee) that claimant voluntarily terminated her employment is not supported by the evidence of record and must be set aside. Her disqualification under section 17 must therefore be vacated. Finally, I believe any decision on the issue of whether Ms. Davidson should be ordered to make repayment should be held in abeyance until the issue of misconduct is resolved.

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 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 on the issue of claimant's disqualification and the matter REMANDED on the issue of whether Claimant should be disqualified for proved misconduct.

/s/
Joseph P. Ippolito
MAGISTRATE

OCTOBER 25, 2012

1986). See also Gen. Laws § 42-35-15(g), supra p. 6 and Guarino, supra p. 7, fn.1.