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

Kevin A. Paquette	:	
	:	
v.	:	**A.A. No. 12 - 215**
	:	
Dept. 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.

Entered as an Order of this Court at Providence on this 19th day of December, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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

Kevin A. Paquette	:	
	:	
v.	:	**A.A. No. 12 - 215**
	:	
Department of Labor and Training,	:	
Board of Review	:	

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 Mr. Kevin A. Paquette urges that the Board of Review of the Department of Labor and Training erred when it held that he 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 AND TRAVEL OF THE CASE

Mr. Kevin A. Paquette worked as a manager for M & G Trucking for one

year. His last day of work was March 23, 2012. He filed a claim for unemployment benefits on April 10, 2012 but the Director determined he left his job without good cause and was therefore disqualified from receiving benefits pursuant to Gen. Laws 1956 § 28-44-17. Claimant appealed from this decision and Referee Nancy Howarth held a hearing on the matter on July 16, 2012. Claimant appeared with counsel and testified. Representatives of the employer also testified. M & G was also represented by counsel.

In her August 10, 2012 decision, the Referee made the following Findings of Fact:

> The claimant was employed as a manager by the employer. In March of 2012 he requested vacation leave to repair a property he owned in South Carolina. The employer granted him two weeks. The claimant was scheduled to return to work on April 9, 2012. He contacted the employer on April 8, 2012 and advised him that he required additional time to repair the property. The employer denied his request for an extension of his vacation. He informed the claimant that he needed him to return to work. The claimant did not report to his job again, but remained in South Carolina.

Referee's Decision, August 10, 2012, at 1. Based on these findings, the Referee concluded that his failure to report back to work constituted a leaving without good cause within the meaning of Gen. Laws 1956 § 28-44-17:

> * * *
> In order to establish that he had good cause for leaving his job the claimant must show that the work had become unsuitable or that she was faced with a situation that left him with no reasonable alternative other than to terminate his employment. The burden of proof in establishing good cause rests solely with the claimant. In the instant

> case, the claimant has not sustained this burden. The record is void of any evidence to indicate that the work itself was unsuitable. The credible evidence and testimony presented at the hearing establish that the claimant did have a reasonable alternative, other than to terminate his employment. He could have returned to work for the employer at the expiration of his vacation. Since the claimant had a reasonable alternative available to him, which he chose not to pursue, I find that his leaving is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Referee's Decision, August 10, 2012, at 2. Accordingly, Referee Howarth affirmed the Director's decision denying benefits to Mr. Paquette.

Claimant filed an appeal and the matter was considered by the Board of Review. In a written opinion issued on September 20, 2012, the members of the Board of Review unanimously 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 October 19, 2012, Mr. Paquette 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; 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, who wishes to be declared eligible for unemployment benefits, must satisfy 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.

---

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. Board of Review, Department of Employment Security, 517 A.2d 1039 (R.I. 1986).

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 he left work without good cause pursuant to section 28-44-17?

ANALYSIS

The Board of Review — adopting the findings of the Referee — determined that Mr. Paquette quit his position because he failed to return to work at the end of his vacation. Because the Claimant never expressly resigned his position, this is what is known as a "de facto quit" or a "constructive quit." Because the Director had found he had quit without good cause, Mr. Paquette bore the burden of proof requiring him to show that he had quit for good cause. However, the Referee found he failed to sustain this burden.

A. Summary of the Testimony of Record.

Mr. Paquette testified that he began to work for M & G Trucking as its dispatch and operations manager on March 20, 2011. Referee Hearing Transcript, at 11. He indicated that on March 23, 2012 he began his two week vacation — one week paid, one unpaid. Referee Hearing Transcript, at 12. He further explained that he used his vacation to travel to South Carolina, where he owned rental property; his

tenant had moved out and he wanted to ready the property for the next tenant. Id.

He stated that, after about two weeks, he was halfway done; at this time, on or about April 9th, he called his employer for his vacation pay but was told by the owner that he could not have it and that he would be laid off. Referee Hearing Transcript, at 13-14, 18-19, 45. During this conversation, he also asked for more time, which he was told he could take. Referee Hearing Transcript, at 20-21. He adamantly denied quitting. Referee Hearing Transcript, at 15.

Mr. Paquette testified that, about two weeks later, after being notified by unemployment that he would not be allowed benefits because he quit, he called his employer from South Carolina; his employer's wife, Melody, the human resources officer, returned his call. Referee Hearing Transcript, at 15-16. When he raised the issue of his unemployment benefits, they began to argue. Referee Hearing Transcript, at 16. The conversation ended abruptly.

Mr. Paquette also called a witness — Ms. Ramirez, his companion. She testified she heard Mark Majkut say he could not give the Claimant his vacation pay but suggested instead he would lay off Mr. Paquette and call him back when he was needed. Referee Hearing Transcript, at 26. She testified Mr. Paquette never quit. Referee Hearing Transcript, at 27.

Mr. Mark Majkut, President of M & G Trucking, testified on its behalf. Referee Hearing Transcript, at 29 et seq. He indicated he approved Mr. Paquette's

leave about a week before he left. Referee Hearing Transcript, at 44. He also described his telephone conversation with Mr. Paquette of around April 9th:

> He did call me. And then he asked me for some more time. I said you've already been gone for two weeks, we need you back here. And then he said, why don't you just put me on unemployment. I said, why would I put you on unemployment, that raises our payroll taxes. I'm not putting you on unemployment, I need you back to work.

Referee Hearing Transcript, at 34. He added that his wife spoke to Claimant on a later occasion — she tried to convince him to return to work but he wanted to collect unemployment. Referee Hearing Transcript, at 35.

The company also presented the testimony of Melody Majkut, Vice-President. Referee Hearing Transcript, at 36 et seq. She testified that on May 22, 2012, after she received a notice that M& G was being charged for his unemployment, she called Mr. Paquette; when she asked him to return to work, he protested that he could not, since he did not have the money to do so. Referee Hearing Transcript, at 37. Ms. Majkut testified that Mr. Paquette was not entitled to a week's paid vacation, since he took a week off with pay shortly after his hiring. Referee Hearing Transcript, at 38-39.

Finally, the employer called Mr. Larry Werchadlo, an employee of M & G, as a witness. Referee Hearing Transcript, at 41 et seq. He testified that Mr. Paquette informed him he needed a couple of weeks off to go to South Carolina and take care of some personal business. Referee Hearing Transcript, at 42. He expected Mr. Paquette to return. Referee Hearing Transcript, at 42-43.

B. Application of the Standard of Review.

After reviewing the testimony elicited at the referee's hearing, we must find that there was a clear divide between the version of events presented by Mr. Paquette (i.e., that he was laid off) and that furnished by the employer's representatives (i.e., that he refused to return to work). After hearing all the evidence and observing the witnesses — and the demeanor of each — Referee Howarth chose to give credence to the employer's testimony. This was her prerogative as the finder of fact. It is indisputable that her finding that Mr. Paquette constructively quit by failing to return to work at the expiration of his approved vacation was entirely supported by substantial, reliable and probative evidence of record.

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 5, 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 his employment by neglecting to return to work at the

expiration of his vacation leave is supported by the substantial evidence of record and must be affirmed.

REPAYMENT

Finally, Claimant was ordered to repay $3,396.00 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:**
> When he filed his claim for Employment Security benefits the claimant failed to notify the Department that he had voluntarily left his job.

Referee's Decision, August 10, 2012, at 1. Based on these findings the Referee arrived at the following conclusion:

> **3. CONCLUSION:**
> * * *
> When he filed his claim for Employment Security benefits the claimant failed to notify the Department that he had voluntarily left his job. As a result of the claimant's misrepresentation he received benefits to which he was not entitled. The claimant is, therefore, overpaid and at fault for the overpayment. Accordingly, it would not defeat the purpose of the above Section of the Act to require that the claimant make restitution.

Referee's Decision, August 10, 2012, at 2. 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; indeed, it should not be ordered where the claimant was without fault or where recovery would defeat the purposes of the Act. In this case the Referee found fault in Claimant's misstatements — i.e., he failed to inform the Department that he had not returned to work. In light of Claimant's testimony confirming what must — in light of the Referee's findings — be

deemed misstatements, I cannot find that the order of repayment is without support in fact and law.

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

DECEMBER 19, 2012