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

Verizon New England	:	
	:	
v.	:	**A.A. No. 12 - 086**
	:	
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.

Entered as an Order of this Court at Providence on this 27th day of November, 2012.

By Order:

/s/
Stephen C. Waluk
Chief Clerk

Enter:

/s/
Jeanne E. LaFazia
Chief Judge

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Department of Labor and Training,	:	
Board of Review,	:	
(April Kuzdeba)	:	

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 Verizon New England urges that the Board of Review of the Department of Labor and Training erred when it held that its former employee, Ms. April Kuzdeba, was 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.

As we shall see, this case presents an unusual fact-pattern — Ms. Kuzdeba sought unemployment benefits even though she had accepted an incentive-laden

separation package from Verizon and formally resigned from its employ. Among those familiar with unemployment benefit jurisprudence, her claim must be viewed with suspicion, because employees who quit are generally disqualified from receiving benefits. See Gen. Laws 1956 § 28-44-17. Nevertheless, the Board of Review granted benefits because it found she left Verizon under circumstances constituting good cause, as defined in section 17.

But I believe the Board's analysis, while valid, was incomplete — focusing as it did on one issue, good cause. For reasons I shall explain, I have concluded that this case must properly be analyzed under a two-prong test — evaluating not only (1) whether she had good cause to quit but also (2) whether her separation from Verizon was voluntary. If the leaving is found either to be involuntary or based on good cause, the Claimant must be deemed eligible for benefits. Nevertheless, after considering the factual record, and for the reasons I shall explain, I have concluded that the decision the Board of Review rendered in this matter should be affirmed; I so recommend.

I. FACTS & TRAVEL OF THE CASE

Ms. April Kuzdeba worked as a splice service technician for Verizon New England for eleven years until June 18, 2010, at which time she accepted a separation incentive package. She filed a claim for employment security benefits and, on July 25, 2011, the Director determined that she was ineligible for benefits because she left her job voluntarily without good cause within the meaning of Gen. Laws 1956 § 28-44-

17. She appealed from this decision and Referee John Costigan conducted a hearing on the matter on November 8, 2011. The Claimant and an employer's representative appeared, with counsel. In his December 7, 2011 decision, the Referee found that Claimant was — at the time she accepted the separation package — dissatisfied with her work assignment and was prosecuting a grievance regarding a recent suspension; but, he found she accepted the separation package because she "decided she could be at risk[]" of termination. Referee's Decision, December 7, 2011, at 1. But, the Referee concluded that her acceptance of the separation package did not constitute a leaving with good cause within the meaning of § 28-44-17 because she failed to prove her job was unsuitable or that she had no reasonable alternative to quitting. Referee's Decision, December 7, 2011, at 2. Accordingly, Referee Costigan found Ms. Kuzdeba was disqualified from receiving unemployment benefits.

On December 12, 2011, Claimant filed an appeal and a further hearing, with the same persons present, was conducted by the Board of Review on March 5, 2012. The hearing was taken up with legal argument by counsel; no additional testimony was elicted. In its March 22, 2012 decision, the Board made the following Findings of Fact:

> The claimant worked as a splice service technician. She was paid $32.40 an hour. In April 2010, the claimant was suspended for five days. After her suspension, the claimant was assigned to garage duty. Her duties consisted of sweeping the floor, picking up boxes, cleaning and administrative work. She talked to her supervisor who determined that she was too unsafe to make service calls. The claimant filed a grievance in May. Shortly thereafter, on or about May 18, 2010, the

> employer offered a voluntary separation package to its employees, with a June 1, 2010 deadline for responding. The employer sought to reduce its work force by soliciting volunteers to accept an offer to leave their jobs. The claimant is low on the seniority list. The claimant accepted the voluntary separation package on or about May 24, 2010 and June 18, 2010 was her last day of work.

Board of Review Decision, March 22, 2012, at 1-2. Based on these findings, the Board concluded that Ms. Kuzdeba's acceptance of the separation agreement did constitute a leaving with good cause within the meaning of Gen. Laws 1956 § 28-44-17:

> * * *
> As the referee noted, the issue is whether the claimant had good cause to leave her job. If good cause is established the claimant is entitled to Employment Security benefits under Section 28-44-17 of the Act. The credible testimony established that the claimant left her job in accordance with a voluntary separation agreement. The claimant was low on the seniority list. In addition, she was not working as splice service technician reasonably believed that she would be laid off if she did not accept the package. Her beliefs are well founded. The claimant was providing little value to the employer, in relation so (sic) her compensation. The claimant demonstrated that the job was unsuitable and that she had no other alternative but to accept the offer and leave.

Board of Review Decision, March 22, 2012, at 2. Thus, the Board held that the Claimant was eligible for unemployment because she left her position at Verizon with good cause. Thereafter, on April 20, 2012, Verizon filed a complaint for judicial review in the Sixth Division District Court. A conference was held by the undersigned on July 25, 2012 at which a briefing schedule was set; memoranda have been received from Verizon and Ms. Kuzdeba.

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; 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." See also Rocky Hill School Inc. v. Department of Employment and Training, Board of Review, 668 A.2d 1241, 1244 (1995). And in Powell v. Department of Employment Security, Board of Review, 477 A.2d 93, 96-97 (R.I. 1984), the Court clarified that "… the key to this analysis is whether petitioner voluntarily terminated his employment because of circumstances that were effectively beyond his control." See also Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (2000).

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

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]

In evaluating specific circumstances which might constitute "good cause," the Court confronts a mixed question of law and fact. D'Ambra v. Board of Review,

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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 Department of Employment Security, 104 R.I. 503, 246 A.2d 213 (1968).

3 Cahoone v. Board of Review of Department of Employment Security, 104 R.I. 503, 506-07, 246 A.2d 213, 215 (1968).

Department of Employment Security, 517 A.2d 1039, 1040 (R.I. 1986). Where the record supports only one conclusion, the case must be decided as a matter of law. D'Ambra, 517 A.2d at 1041. On the other hand, if more than one reasonable conclusion could be reached, the agency decision will be affirmed. D'Ambra, 517 A.2d at 1041.

The Supreme Court of Rhode Island recognized in Harraka, supra, 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.

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 it was clearly erroneous or affected by error of law. More precisely, was

Claimant properly deemed eligible to receive unemployment benefits because she left work involuntarily and with good cause pursuant to section 28-44-17?

V. ANALYSIS

Customarily, I would begin my "Analysis" of a section 17 (leaving without good cause) case by reviewing the facts of record to determine if they support the Board's findings, which would be followed by a comparison of the facts of record to the applicable law. The result of this effort would be a determination whether the Board's decision was supported by facts and law, whether it must be affirmed or reversed.

But, in this atypical case, involving a claimant who resigned pursuant to an incentive plan, we must first undertake a prefatory step: we must clarify the precise legal question to be answered. As I stated at the outset, I find the legal question posed by the Board, although not incorrect, to be incomplete. I shall set myself upon to this task at this juncture.

A. Clarifying the Legal Question.

As stated above, both parties have assumed that the legal question before the Court is whether Claimant had good cause to quit. See Appellant Verizon's Memorandum of Law, at 5-6 and Appellee Kuzdeba's Memorandum of Law, at 8-9. I believe this assumption must be questioned. To be sure, this case must be decided under section 17. Of that, there can be no doubt. All the pertinent cases — from Rhode Island and our sister states — agree that the controlling statutory provision in

cases such as the case sub judice is that section of each state's employment security act which bars benefits to those workers who voluntarily leave work without good cause, such as our § 28-44-17.

But the courts which have applied this voluntary-leaving provision in resignation cases do so in at least two different ways, which implicate two different legal theories. Some have employed a test — the most commonly invoked — which focuses on the requirement that the resignation be justified by good cause; other courts — fewer in number — have inquired whether the claimant's resignation was truly voluntary. For our part, we could simply choose between the two as many courts have done. But, as stated above, I believe we must adopt a two-prong test, encompassing both the voluntariness and good cause tests. But before explaining why I have arrived at this conclusion, I shall review the case precedents of both national and local origin.

1. The National View.

It appears that the majority rule[4] is that these cases are decided by determining whether the claimant has shown that he or she had good cause to quit. See Carolina

[4] My sense that the majority of the relevant cases focus on the "good cause to quit" element in preference to the voluntariness element results from a reading of an annotation and many cases cited therein. See ANNOT., Eligibility for Unemployment Compensation of Employee Who Retires Voluntarily, 75 A.L.R. 5th 339 (2000). However, it gathers cases in which the eligibility of all claimants who retired is considered — not just those who retired pursuant to a special termination or retirement package. Nevertheless, it is certainly helpful — if not indispensable — to a thoughtful consideration of the question before the Court.

Power & Light Company v. Employment Security Commission of North Carolina, 363 N.C. 562, 569-70, 681 N.E.2d 776, 781 (2009)(Claimant did not have good cause to quit and accept retirement package where evidence he would be laid off was absent from record); Mshar v. Review Board of the Indiana Employment Security Division, 445 N.E.2d 1376 (Ind. App. 1983)(Court reversed board's finding that claimant did not have good cause to quit); Trupo v. Board of Review, 268 N.J. Super 54, 61-62, 632 A.2d 852, 856-57 (1993)(Court finds the referee — in finding good cause not to have been proven — did not properly consider claimant's subjective fears, which were based on objective facts, of layoff and its financial consequences; however, remand was not ordered because offset statute resulted in no benefits being at issue). Cf. Ford Motor Company v. Ohio Bureau of Employment Services, 59 Ohio St. 3d 188, 189, 571 N.E.2d 727, 729 (1991)(Benefits allowed where statutory provision specifically exempts quitting pursuant to a separation plan from the good cause requirement).

Other cases do not consider the existence of good cause vel non but engage in an analysis of an alternative issue: voluntariness. A leading case of this type is the Massachusetts Supreme Judicial Court's decision in White v. Director of the Division of Employment Security, 382 Mass. 596, 416 N.E.2d 962 (1981). The Court found that the administrative agency had not made findings on the key question — voluntariness — and so, it remanded the case so that findings could be made as to whether she had a reasonable fear of imminent termination. White, 382 Mass at 597-

98, 416 N.E.2d at 963-64. See also Reserve Mining Co. v. Anderson, 377 N.W.2d 494, 497-98 (Minn. App. 1985)(Retirement after lay-off notice received not voluntary) and Tomei v. General Motors Corp., 194 Mich. App. 180, 187-88, 486 N.W.2d 100, 104 (1992)(Claimant's decision to retire after his plant closed — rather than seek a transfer — deemed involuntary as a matter of law).

And finally, we must acknowledge that some cases consider both issues. See e.g. Wailuku Sugar Company v. Agsalud, 65 Haw. 146, 150-51, 648 P.2d 1107, 1111-12 (1982)(During crisis in the sugar industry, the company sweetened the provisions of its pension plan for retirement-eligible employees, attempting to entice them to retire, in order to save the jobs of younger workers; the Court determined claimant's retirement was not voluntary because it was "due to pressure and persuasion on the part of the employer" and based on good cause because it was implemented for real, substantial and compelling reasons).

2. Rhode Island Precedents.

Research has revealed no case in which the Rhode Island Supreme Court has addressed the issue of whether a person who accepts a severance or termination package may be deemed eligible for benefits.[5] Indeed, of the thousands of Board of

[5] In so stating I am distinguishing the Court's decision in Kane v. Women and Infants Hospital, 592 A.2d 137 (R.I. 1991), which shall be discussed later. In Kane, which was decided when section 17 specified statutorily that leaving to accept a retirement plan constituted good cause as a matter of law. Each of the Rhode Island cases we shall review were decided after section 17 was modified to remove the provision that directed that good cause be found in such cases. See

Review decisions that the District Court has reviewed since assuming appellate responsibilities in 1976, only a few, scattered, sporadic cases have considered the eligibility for benefits of an employee who quit to accept an early retirement or severance package. These cases generally, but not exclusively, focus on "good cause."

The first District Court case to address a similar set of facts — decided eighteen years ago — is Costa v. Department of Employment and Training, Board of Review, A.A. No. 94-60 (Dist.Ct. 10/18/1994)(DeRobbio, C.J.). In Costa, the Court affirmed a Board of Review finding that an employee did not have good cause to quit when he accepted a severance package after his employer was taken over by new ownership — who informed the employees there salaries would not change but their duties might. Costa, slip op. at 4-5, 7-8.

The District Court next confronted this issue seven years later in Hill v. Department of Labor and Training, Board of Review, A.A. No. 00-54 (Dist.Ct. 9/6/2001)(Quirk, J.). In Hill, Judge Quirk of the District Court affirmed the Board of Review's finding that the claimant did not have good cause to quit because his fears of a future layoff were based on "speculation" and not well-founded. Hill, slip op. at 7.

The third case in this series is Colavita et al. v. Department of Labor and Training, Board of Review, A.A. No. 04-30 (Dist.Ct. 06/09/2005)(Moore, J.), which

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P.L. 1993, ch. 298.

concerned appeals by three claimants who had accepted a 2003 Verizon termination package. The Court reversed the Board's finding that the claimants should be disqualified under section 28-44-17 on two grounds: first, the Court found that the leavings were not voluntary but made under compulsion — since the possibility of future termination was "real"; second, that the claimant did have a reasonable belief that he was facing a layoff and this belief provided good cause to quit. Colavita, slip op. at 4.[6]

Finally, earlier this year, Judge Gorman of the District Court decided two cases arising out of the very same 2010 Verizon early retirement plan accepted by Ms. Kuzdeba; they are — (1) Fogarty, Director of the Department of Labor and Training v. Board of Review of the Department of Labor and Training (Geraldine Asher), A.A. No. 11-61 (Dist.Ct. 3/26/2012) and (2) Fogarty, Director of the Department of Labor and Training v. Board of Review of the Department of Labor and Training (Steven J. Standring), A.A. No. 11-61 (Dist.Ct. 3/26/2012). In Asher, the Court noted the Claimant's uncontradicted testimony that she believed that by failing to accept the termination package she risked losing her pension benefits or being transferred to another state. Asher, slip op. at 5; accordingly, the Court affirmed the Board's ruling allowing benefits based on a finding that Ms. Asher quit for good cause. Asher, slip op. at 3, 6. In Standring the claimant, like Ms. Kuzdeba a splice

[6] In the opinion the Court cited Kane v. Women and Infants Hospital, 592 A.2d 137 (R.I. 1991), which shall be discussed later.

service technician, testified that he accepted the package because "they were downsizing" and "the workload was getting low" and he — a service splice technician — was doing "a files job." Standring, slip op at 5-6, fn. 2 citing Referee Hearing Transcript, at 6-8. Accordingly, the Court affirmed the Board's decision to allow benefits. Standring, slip op at 6-7.

3. The Appropriate Legal Test.

Having combed the legal landscape, we must now answer the question — Which test is better suited to resolve this question: a voluntariness assessment, or a good cause evaluation, or a test that encompasses both? To reiterate, I believe we must follow this last course. Why? — Because I believe the teaching of our Supreme Court requires us to do so. Firstly, the Court has indicated generally that it is a fundamental precept of statutory interpretation that "… the Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the court will give effect to every word, clause or sentence, whenever possible." State v. Bryant, 670 A.2d 776, 779 (R.I. 1996). Secondly, regarding section 17 cases, our Supreme Court has specifically stated — "To recover under § 28-44-17, an employee must leave for both good cause *and* voluntarily." Kane, supra at 12 n. 5, 592 A.2d at 139 (Emphasis in original). That this Court is bound to follow the directives of our Supreme Court is a constitutional principle too fundamental to require citation. And so, I have concluded that, in adjudicating this case, we must give appropriate attention to both elements, as was done by Judge Moore in Colavita.

Of course, this answer begs the question: How should we apply the two elements. Do we combine them together into one big jumble (like they seem to have been treated in the Wailuku case) or can we distinguish between the two, and allocate a different function to each? In fact, I believe we can assign to each a different role, in the following manner — Insofar as the question before the Court is a determination of the objective likelihood of the Claimant's termination at the moment he or she accepted the separation package, a voluntariness issue is presented; however, if the inquiry focuses on the claimant's subjective understanding of his or her future employment prospects (which may differ from objective reality), an issue of good cause is presented. I shall now offer a few clarifying comments as to each element.

a. The Voluntariness Test.

Obviously, in all cases wherein an employee accepted an incentive package we could say — without any further ado — that he or she quit voluntarily. The worker signed the papers without duress, doing so for a financial benefit. We could therefore state he or she quit voluntarily.

So, in order to make voluntariness vel non a point of contention we must presuppose the ability of the fact-finder (whether administrative or judicial) to look beneath the surface image of what transpired (a putative resignation) and examine the three-dimensional reality (identifying those factors which truly triggered the claimant's acceptance of the plan). Can we do so? I believe we can.

In fact, doing so would not be unprecedented in Rhode Island law. In an analogous setting, the Rhode Island Supreme Court authorized the Board of Review (and this Court) to look beyond appearances to the reality of the termination and to determine for itself, whether the claimant terminated voluntarily or involuntarily. The case to which I refer is Kane v. Women and Infants Hospital, supra. In Kane the Rhode Island Supreme Court held that a worker who retired in the face of termination for misconduct did not truly quit, but was terminated. The Court, in an opinion authored by Justice Murray, commented thusly:

> Most jurisdictions hold that if an employee resigns because of a reasonable belief that if he or she is about to be discharged for job performance, then the resignation is not voluntary. [citations omitted]. These cases examine the voluntariness of the resignation according to whether the employee acted of his or her own free volition. Green v. Board of Review of Industrial Commission, 728 P.2d 996, 998 (Utah 1986). Even though an employee may be given a choice to resign or be fired, "… if that choice is not freely made, but is compelled by the employer, that is not exercise of volition." Id. An employee who wishes to continue employment but nonetheless resigns because the employer has clearly indicated that the employment will be terminated, does not leave voluntarily. Perkins v. Equal Opportunity Commission, 234 Neb. 359, 362, 451 N.W.2d 91, 93 (1990).

Kane, 592 A.2d at 139. Accordingly, because she did not terminate voluntarily, the Court found Ms. Kane ineligible to receive benefits under section 17[7] and the claimant disqualified for misconduct under section 28-44-18. In doing so the Court

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[7] At the time, section 17 provided that quitting pursuant to a retirement plan cannot be determined to have quit without good cause. See Section 17 as quoted in Kane, supra, 592 A.2d at 138.

unequivocally stated its preference for substance over form on the subject of the voluntariness of the claimant's separation.[8] Thus, I believe the Supreme Court would once again find that the Board of Review does have the authority to determine an express resignation was in fact involuntary.

To recap, the first prong of the test is whether the claimant was, objectively, likely to be laid off. If the answer is yes, we must find that section 17 does not disqualify the claimant from receiving benefits. If the answer is no, we must ask the second question — whether the claimant had good cause to quit.

b. The Good Cause Test.

In the retirement context, I believe the "good cause" test should be reserved for issues of the claimant's subjective knowledge. Such beliefs, to be actionable, although subjective, must nevertheless be reasonable — based on articulable facts. Neither the Board nor this Court can grant benefits based on fantasy or delusion.

Of course, in the retirement context, the good cause finding will usually be based on factors other than the inherent unsuitability of the job — i.e., issues such as mistreatment by a superior, dangerous working conditions, being asked to perform illegal duties; instead, it will be based on issues in the broader employment

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[8] In finding that the claimant did not quit voluntarily (in the face of an express resignation), we are finding a constructive termination. This is analogous to this Court's recognition — in innumerable cases — of the concept of the constructive quit. This concept is often invoked in situations wherein the claimant has walked off the job or failed to report for work — but never formally resigned.

relationship. This is not unprecedented. Our Supreme Court has found that extraneous reasons may make the employment relationship untenable, as has the District Court. See Rocky Hill School, supra, (leaving to join one's spouse at her new job in Colorado found to be good cause); see also J. Arthur Trudeau Memorial Center v. Department of Employment and Training, Board of Review, A.A. No. 94-190 at 5 (Dist.Ct.10/18/94) (DeRobbio, C.J.)(Award of benefits affirmed to claimant who quit after maternity to care for twins and who had explored alternative child care possibilities). Again, the hallmark of the Rhode Island good cause standard is that the reason for leaving must be beyond the employee's control.

c. An example of a two-prong test case.

To see how the two-prong test would be applied in the real world, we may examine a decision rendered by the Massachusetts Appeals Court — State Street Bank & Trust Co. v. Deputy Director of the Division of Employment & Training, 66 Mass. App. 1, 845 N.E.2d 395 (2006). In State Street Bank, two workers had accepted a voluntary separation package (VSP) which the bank had offered as a way to begin to reduce its workforce. State Street Bank, 66 Mass. App. at 4, 845 N.E.2d at 397. Each was granted benefits by the Board of Review; but, in each case, a District Court judge reversed that decision. State Street Bank, 66 Mass. App. at 10, 845 N.E.2d at 402. Following up on White, supra, (which we have listed with the *voluntariness* cases) the Court first determined that substantial evidence existed to show that the two claimants' fears of termination were "objectively reasonable." State Street Bank, 66

Mass. App. at 10, 845 N.E.2d at 402. As a result, it sustained the Board's decision that the claimants had accepted State Street's VSP involuntarily. State Street Bank, 66 Mass. App. at 11, 845 N.E.2d at 402-03.

The Court then introduced a separate, second point of analysis — deciding that an employer who offers a separation package and then fails to accurately inform workers of their ongoing risk of layoff, may (albeit unintentionally), provide the claimant with good cause to quit.[9] See State Street Bank, 66 Mass. App. at 11, 845 N.E.2d at 402-03. The Appeals Court noted that the employer elected not to inform employees of the progress of the package and explained:

> … By constructing the VSP the way it did, then, State Street created an environment in which all employees were required to guess, speculate, and cobble together as best they could information on which to base a decision as to whether they would be involuntarily separated.[]
>
> In light of State Street's approach, we think that [the claimants], who left State Street's employ after concluding on the basis of facts, observations, talk among fellow employees, and whatever other rational aids to decision-making were available to them, inferences and judgments that they were likely to go involuntarily if they did not accept the VSP, departed voluntarily for good cause within the meaning of G.L. c. 151A, § 25(e)(1). By creating an environment in which all employees had to speculate on the likelihood that they would be able to avoid involuntary separation, State Street gave employees who reasonably feared involuntary separation good cause to adopt the mitigating strategy of accepting the VSP and leaving.

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[9] The Court emphasized that — in order to provide good cause — the misinformation relied upon by the claimant must be "attributable to the employer." State Street Bank, 66 Mass. App. at 11-12, 845 N.E.2d at 403 citing G.L. c. 151A, § 25(e)(1). Our equivalent statute, § 28-44-17, does not contain this restriction on good cause.

State Street Bank, 66 Mass. App. at 11-12, 845 N.E.2d at 403 (footnote omitted). Accordingly, the Court found good cause to quit and affirmed the Board's decision to grant benefits. State Street Bank, 66 Mass. App. at 12, 845 N.E.2d at 403.

B. Evaluating the Factual Record.

With this two-prong framework in mind, we are finally ready to review the facts of record, disregarding those that are not pertinent to the questions we have identified. The Board of Review found Claimant Kuzdeba voluntarily quit for good cause. In my view, the key findings made by the Board may be synopsized as follows — that Ms. Kuzdeba took the separation package because the employer was reducing its workforce and she felt she would be laid off. See Board of Review Decision, at 2, quoted supra at 4. The Board found — "Her beliefs are well founded." Id. In my view, it is upon this foundation that its decision rests. Accordingly, we must, before doing anything else, determine whether this finding is supported by the record.

Claimant testified that she had wanted to work for Verizon for thirty years. Referee Hearing Transcript, at 13. However, she explained that, just prior to her separation, she had been going through a difficult period at work; she was taken off the road and assigned to duties in the garage. Referee Hearing Transcript, at 29. Despite receiving her full service technician salary, she was used for office work (such as procuring supplies), computer work, and even cleaning.[10] Referee Hearing Trans-

[10] I believe the extensive evidence received at the evidentiary hearing below regarding the disciplinary proceedings against Claimant was largely immaterial.

cript, at 29, 39, 52. Prior to when the Verizon separation incentive package was announced she was told by her superior, Bob London, that if enough people did not accept the package there would be a mass lay off. Referee Hearing Transcript, at 16. She testified that she was informed by Mr. London of the number of people Verizon was looking to eliminate — although she could not recall that number during her testimony. Referee Hearing Transcript, at 17, 22. And she knew that she was low on the seniority totem pole, even though she had been working at Verizon for almost eleven years. Referee Hearing Transcript, at 16. As a result, she became afraid she could be laid off. Referee Hearing Transcript, at 17. In fact, Bob London advised her to "take it while you can." Referee Hearing Transcript, at 17. So, she took the separation package, which included a fifty thousand dollar payment. Referee Hearing Transcript, at 17, 24.

In answer to a question from counsel for the employer, she denied that she was aware that she could not be laid off. Referee Hearing Transcript, at 25. She also

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See Referee Hearing Transcript, at 9-15, 20-21, 26-29, 35-37, 41-51. Our decision does not rest on any implication that her job (i.e., the inside job she was doing when she separated) was inherently or intrinsically unsuitable. On this point I agree with Verizon's argument. Appellant's Memorandum of Law, at 6-8. The Court has long held that disciplinary proceedings — whether justified or not — generally do not provide a worker with good cause to quit. This Court has held that even if an employee has endured unfair discipline, he should seek other work before quitting. No, here the good cause must rest on extrinsic factors.

However, her disciplinary history may be relevant insofar as it colored her perception of Verizon's regard for her — which she deemed to be low — and how that might affect the company's willingness to maintain her employment.

indicated that — to her knowledge — because she had resigned and taken the incentive package she was not eligible for a pension later. Referee Hearing Transcript, at 60.

Mr. Mark Durocher, Verizon's Operations Manager for Installation and Maintenance in New England, also testified. Referee Hearing Transcript, at 40 et seq. He supervised some 230 employees. Referee Hearing Transcript, at 41. He began by discussing safety procedures generally, the fact that Claimant had been disciplined for safety violations, and the details of the incident that resulted in a 5-day suspension. Referee Hearing Transcript, at 41-50. He indicated that Claimant had been identified as a high-risk employee. Referee Hearing Transcript, at 43. He denied Ms. Kuzdeba was removed permanently from the field. Referee Hearing Transcript, at 51.

Mr. Durocher explained that the retirement-offer packages were mailed directly to the employees and that the offer had to be accepted by June 1, 2010. Referee Hearing Transcript, at 55, 58. He testified that anyone hired prior to 2003 would have enough seniority to "probably" miss out on a forced layoff. Referee Hearing Transcript, at 57. However, he conceded that he did not know whether the target number was achieved or how layoffs were determined. Referee Hearing Transcript, at 62.

C. Application of the Law to the Facts.

The Board of Review found claimant's fears of lay off to be well founded. And, as discussed previously, the Board's findings are supported by the record. See discussion, supra, section V-B of this opinion.

1. The Voluntariness Test.

Because the Board did not make a finding on the issue of voluntariness, our review of the first prong of the test must be limited. Unless we can find the facts only support one conclusion, we would be required to remand the case to the Board of Review for findings to be made.[11]

The record on this question comes from the testimony of Ms. Kuzdeba and Mr. Durocher. Her testimony was emphatic and largely uncontradicted — especially regarding her testimony regarding the statements made be her supervisor — Mr. London, which left her with the conclusion that she was in employment peril. His was equivocal, at best. But, weighing the testimony of the two witnesses, I cannot say she carried the day as a matter of law.

On the other hand, Verizon urges that the record shows definitively that Claimant could not have been laid off. In so arguing it relies on two documents — (1) a 2008 Memorandum of Understanding and (2) a so-called "Job Security Letter." Neither of which was entered into evidence at the hearing before the Referee;

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[11] As we shall see, remand is necessary unless we can resolve the case without regard to the issue of voluntariness.

instead, they were submitted in conjunction with Verizon's response to the Claimant's appeal to the Board. During oral argument, the Board (through an identified member) seems to have acknowledged these documents were part of the record (Board of Review Transcript, at 26-28); but, the Board apparently did not accord them any probative value, since they were not mentioned in its decision. Board of Review Decision, passim.

I cannot fault the Board for its failure to give these documents any weight. These documents were not authenticated. The copies presented were not even signed. Verizon's failure to explain these purported agreements through competent witnesses was particularly notable because the so-called "Job Security Agreement" appears to contain an exception for "external events" which is not defined within the four corners of the document. Accordingly, I believe the Board was free to assign them no probative value.[12]

And so, as stated above, although I believe the evidence was overwhelming in favor of the proposition that Ms. Kuzdeba's resignation was not voluntary, I cannot state that it was conclusive as a matter of law. If this issue is to be further pursued, we would be required to remand the case to the Board of Review for specific findings to

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[12] Cf. Curtis v. Commissioner of the Division of Unemployment Assistance, 68 Mass. App. 516, 521-22, 863 N.E. 2d 71, 76 (2007)(Voluntariness test not satisfied where 19-year Verizon employee retired accepting incentive package despite knowing he was contractually safe from lay-off or transfer). Because such knowledge was not proven in the instant case, it is distinguishable from Curtis.

be made. To see if this eventuality can be avoided, we must move to the second prong of the test — good cause.[13]

2. The Good Cause Test.

At this point we could remand the case for a determination of voluntariness. But since the claimant must prevail if either test is satisfied, I shall address the good cause issue as well, to see if it may be resolved on that basis. I shall also do so in an effort to provide this Court with the fullest report of this case.

As was noted in subsection 1, supra, Verizon apparently failed to satisfy the Board that Ms. Kuzdeba was protected by certain contractual safeguards. But Verizon's failure of proof was doubly faceted. It not only failed to prove — as it insists — that claimant was immune to layoff; it also failed to prove that Claimant was aware she enjoyed this putative status. There is no indication these documents were submitted to the union membership generally or to Ms. Kuzdeba in particular. There was no proof she otherwise knew of any such agreement. Because Verizon failed to otherwise prove Claimant knew of the alleged guarantees, this case must be

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[13] Mr. Durocher's testimony was vague and uncertain. Moreover, Verizon did not take advantage of the rehearing to provide rebuttal testimony. Cf. Curtis, supra n. 10, 68 Mass. App. at 521-22, 863 N.E. 2d at 76 (Voluntariness test not satisfied where 25-year Verizon employee [not the claimant described in footnote 12] retired accepting incentive package on mere "possibility" of lay-off).

distinguished from the Hill case, cited above, which was relied upon by Verizon in its memorandum. Appellant's Memorandum, at 5.

Claimant's testimony was uncontradicted — not only at the hearing before the Referee but before the Board, which was willing to hear additional evidence. Board of Review Hearing Transcript, at 3. This may be understandable at the hearing before the Referee — but unfathomable at the hearing before the Board — where Verizon neglected its second chance to prove its case. As the record stands, she was not told she couldn't be laid off. In fact Mr. London suggested that she leave.[14] And, in forming her estimation of the likelihood that she would be laid off, Ms. Kuzdeba was also entitled to take into account Verizon's apparent lack of confidence in her — as evidenced by the fact that her work assignment had been changed for three months. Referee Hearing Transcript, at 12. See Standring, supra.

In sum, based on the evidence of record, I believe the Board's finding that Claimant left under circumstances that were effectively beyond her control is supported by the reliable, probative, and substantial evidence of record. In this regard

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[14] Referee Hearing Transcript, at 17. Accord, Curtis, supra n.10, 68 Mass. App. at 522-25, 863 N.E. 2d at 77-78 (Case remanded for determination of good cause where, inter alia, supervisor inquired of the claimant [a third individual, neither of the claimants described in footnotes 12 or 13] whether she was going to retire "because they needed to reduce force" and "he could not guarantee" her job future.

I shall a quote a question which was posed and answered by an appellate panel of the New Jersey Superior Court, when confronting a similar claim for benefits, in Trupo, supra:

> Does a sixty-one year old woman, who is the head of her household and who holds a position of office clerical assistant without seniority at her place of employment and who fears an impending job layoff, have any realistic option when offered an early retirement incentive with full medical coverage other than to accept early retirement? We think not. … The fear expressed by Trupo of employment termination without medical insurance at age sixty-one, in our opinion, may not be viewed as "imaginary, trifling or whimsical." Domenico v. Bd. of Review, supra, 192 N.J. Super. [284,]at 288, 469 A.2d [961] at 964 [App. Div. 1983].

Trupo, supra, 268 N.J. Super. at 60, 632 A.2d at 856 (Citation corrected and completed). Noting the difference in circumstances that apply to Ms. Kuzdeba and Ms. Trupo, I nonetheless believe that the same principles come into play in the instant case. I therefore conclude that the Board's decision that Claimant Kuzdeba left her position for good cause is not clearly erroneous.

D. Resolution.

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 section 28-44-54 of the General Laws 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 with good cause by accepting Verizon's separation plan is supported by the reliable, probative and 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

NOVEMBER 27, 2012