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

Gilda Ferro	**:**	
	:	
v.	**:**	**A.A. No. 14 - 031**
	:	
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 and the memoranda of counsel, 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 hereby AFFIRMED.

Entered as an Order of this Court at Providence on this 22nd day of December, 2014.

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. Gilda Ferro urges that the Board of Review of the Department of Labor and Training erred when it held her to be disqualified from receiving unemployment benefits because it found that she had left her position without good cause as defined in Gen. Laws 1956 § 28-44-17. Jurisdiction for appeals from decisions of the Department of Labor and Training 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. Employing the standard of review applicable to administrative appeals, I find that

the decision rendered by the Board of Review on the issue of eligibility was not clearly erroneous; I therefore recommend that the decision of the Board of Review be AFFIRMED.

I
FACTS AND TRAVEL OF THE CASE

The facts and travel of the case are these: Ms. Gilda A. Ferro was employed by Women and Infants Hospital for seven months. Her last day of work was September 7, 2012. She filed her claim for unemployment benefits on December 20, 2012 but on January 22, 2013 a designee of the Director issued a decision finding that Ms. Ferro had left her employment without good cause within the meaning of Gen. Laws 1956 § 28-44-17.

Claimant appealed from this decision and on February 18, 2013 Referee Nancy L. Howarth conducted a hearing on the matter. Claimant appeared without counsel; no representatives of the employer were present. Two days later, the Referee issued a decision which affirmed the Director's denial of benefits to Claimant. Referee Howarth made the following findings of fact:

> The claimant was employed as a senior research assistant by the employer. She began a maternity leave on March 5, 2012. She returned to work on September 5, 2012. The claimant's young daughter was having disciplinary problems in school. The claimant had arranged for someone to take care for her baby. However, he cried frequently the first day she returned to work. She worked only half her shift the following day. The baby continued crying and the babysitter refused to care for him any longer. The claimant contacted three daycare facilities. They did

> not have availability. The claimant voluntarily left her job as of September 7, 2012, due to issues with her children. She had no job to go to, nor the promise of one.

Decision of Referee, February 20, 2013, at 1. Based on these findings, the Referee pronounced the following conclusions:

> * * *
> In order to establish that she had good cause for leaving her job, the claimant must show that the work had become unsuitable or that she had no reasonable alternative other than to terminate her 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 had become unsuitable. The evidence and testimony presented at the hearing establish that the claimant did have a reasonable alternative, other than to terminate her employment. She could have requested additional time to obtain daycare prior to leaving her job. Since the claimant had a reasonable alternative available to her, which she chose not to pursue, I find that her leaving is without good cause under the above Section of the Act. Accordingly, benefits must be denied on this issue.

Decision of Referee, February 20, 2013, at 1. Accordingly, Referee Howarth affirmed the Director's decision denying benefits to Ms. Ferro.

Claimant filed a timely appeal and the matter was considered by the Board of Review; the Board did not hold a new hearing but considered Claimant's appeal on the basis of the record certified to it.[1] On April 15, 2013, the Board, by a 2 to 1 vote, affirmed the decision of Referee Howarth, finding it to be a proper adjudication of the facts and the law applicable thereto; in fact, the Board adopted the Referee's decision

[1] This procedure is authorized by Gen. Laws 1956 § 28-44-47.

as its own. Decision of Board of Review, April 15, 2013, at 1. The Member Representing Labor dissented, commenting that leaving a job because of child care issues has been held to constitute good cause to quit under section 17.

Eleven months later,[2] on March 5, 2014, Ms. Ferro filed a complaint for judicial review in the Sixth Division District Court.

II
APPLICABLE LAW

The fundamental issue in 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

[2] Her appeal was filed ten months after the 30-day appeal period had expired. However, I shall not recommend dismissal for lateness; instead, I shall address the merits of the instant case and recommend affirmance.

> 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 it added:

> * * * 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. 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." Also, Rhode Island Temps, Inc. v. Depart-ment of Labor and Training, Board of Review, 749 A.2d 1121, 1129 (2000).

III
STANDARD OF REVIEW

The standard of review is provided by Gen. Laws 1956 § 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.' "[3] The Court will not substitute its judgment for that of the Board as to the weight of the evidence on questions of fact.[4] Stated differently, the findings of the agency will be upheld even though a reasonable mind might have reached a contrary result.[5]

The Supreme Court of Rhode Island recognized in Harraka, supra at 12, 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

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[3] Guarino v. Department of Social Welfare, 122 R.I. 583, 584, 410 A.2d 425 (1980) citing Gen. Laws 1956 § 42-35-15(g)(5).

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

[5] Cahoone v. Board 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).

restrictions on eligibility under the guise of construing such provisions of the act.

IV
ANALYSIS

A
Evidence of Record

At the February 18, 2013 hearing conducted by Referee Howarth in this matter the sole witness was Claimant Ferro. Referee Hearing Transcript, at 1, 8 et seq.

As Ms. Ferro began her testimony Referee Howarth asked what had caused her be separated from her position at the Hospital. Referee Hearing Transcript, at 8-9. She responded by saying she had "a higher, a different calling for [her] life." Referee Hearing Transcript, at 9. And she added that the job did not fulfill her personally when she returned to work after her maternity leave. Id.[6] Referee Hearing Transcript, at 9.

Ms. Ferro said her children were the "main cause" for her inability to last only two days back at work. Referee Hearing Transcript, at 10. She was called by her eight year-old daughter's school two or three times regarding behavioral issues, which required her to leave work to pick her up. Referee Hearing Transcript, at 10-12. And the baby was crying steadily, even on the second day when she only worked half a day.

[6] Ms. Ferro testified she had gone out on maternity leave on March 3, 2012 and returned on September 5, 2012. Referee Hearing Transcript, at 9-10.

Referee Hearing Transcript, at 11-13. Ms. Ferro felt if she continued working she would have been an unfit parent. Referee Hearing Transcript, at 12.

When the Referee asked if two days was a sufficient test of her ability to work — and care for her family — she said that she had tried several daycare facilities, but to no avail. Referee Hearing Transcript, at 12-13. When asked if she sought a leave of absence she responded that she did not think she was eligible, since she had already extended her maternity leave twice — due to a difficult delivery. Referee Hearing Transcript, at 13-15.

B

Discussion

1

The Section 17 (Leaving For Good Cause) Issue

In his dissenting opinion, the Member Representing Labor commented that leaving a position to attend to child care has been deemed good cause within the meaning of section 17. This is certainly true,[7] though the principle has exceptions. For instance, this Court has upheld the denial of benefits where the claimant had not taken the opportunity to obtain a temporary leave.[8]

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[7] E.g. Murphy v. Department of Employment and Training Board of Review, A.A. No. 92-30, Slip op. at 5-7 (Dist.Ct. 04/16/92)(DeRobbio, C.J.)(Court reverses Board's finding of disqualification, where Claimant resigned to care for infant).

[8] E.g. Estrella v. Department of Employment and Training Board of Review, A.A. No. 94-111, Slip op. at 6-7 (Dist.Ct. 11/22/94)(Cenerini, J.) (Board of Review found Claimant not entitled to benefits; affirmed, where Claimant, who resigned to

In this case, Claimant made the drastic (and certainly difficult) decision to quit only two days after her maternity leave ended. It is hard to conclude that she did not act — as the Referee found — precipitously. On this basis alone the decision of the Board of Review may be upheld, since it is not clearly erroneous. Nevertheless, there is another basis upon which the Board of Review's decision may be upheld.

2

The Section 12 (Availability) Issue

While claimants who quit in order to care for their children may not be disqualified under section 17, they are often disqualified under § 28-44-12,[9] which requires those receiving unemployment benefits to be available for work.[10] Now, while Ms. Ferro's availability to work was discussed (impliedly, at least) throughout the evidentiary hearing held in this case, Referee Howarth made no findings on this issue. In such situations, it is generally our practice to remand the matter for findings to be

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care for ill child in Florida, declined leave of absence); Costa v. Department of Employment and Training Board of Review, A.A. No. 94-249, Slip op. at 7-8 (Dist.Ct. 08/23/95)(Higgins, J.) (Court affirmed Board of Review's disqualification of Claimant, who quit due to child care problems, where she never asked for leave of absence).

[9] Cerullo v. Department of Employment and Training Board of Review, A.A. No. 96-31, Slip op. at 5-6 (Dist.Ct.08/09/96)(Board of Review finds new mother who placed restrictions on her availability for employment ineligible for unemployment benefits; affirmed).

[10] Section 28-44-12 also requires those receiving benefits (1) to be able to work and (2) to actively search for work. I will not consider whether Claimant satisfied these conditions because they were not discussed at the hearing.

made. However, I do not believe that procedure is necessary in this case.

Claimant testified that she quit because she could not work at the Hospital and take care of her family — not because of any problem regarding her position, but generally. Her job had not become unsuitable. Quite simply, as a result of her issues with her children, she felt she could not work in any position for any employer. Accordingly, based on her own testimony, Ms. Ferro was completely unavailable for work and is subject to disqualification pursuant to § 28-44-12, as well.

VI
CONCLUSION

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. Under 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.[11] Upon careful review of the evidence, I conclude that the Board's decision disqualifying Ms. Ferro from receiving unemployment because she quit without good cause is not clearly erroneous in view of the reliable, probative, and substantial evidence of record — and the applicable law. Gen. Laws 1956 § 42-35-15(g)(3),(4).

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

I therefore recommend that the Decision of the Board of Review rendered in this case be AFFIRMED.

/s/
Joseph P. Ippolito
MAGISTRATE

DECEMBER 22, 2014