Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-425

MAY TERM, 2018

Michael Deuso* v. Department of Labor (Shelburne Limestone Corporation, Employer)	}	APPEALED FROM:
	}	Employment Security Board
	}	DOCKET NO. 08-17-060-12

In the above-entitled cause, the Clerk will enter:

Claimant appeals pro se from the denial of his request for unemployment compensation benefits. He argues that he was terminated by his employer and that he did not quit. We reverse the Employment Security Board's decision and remand for additional proceedings.

Claimant worked for Shelburne Limestone Corporation for approximately thirty-five years. His last day of work was April 21, 2017. Claimant applied for unemployment compensation benefits, and a claims adjudicator denied his request. The claims adjudicator found that claimant left his employment voluntarily without good cause attributable to his employer. See 21 V.S.A. § 1344(a)(2)(A) (providing that individual is disqualified for benefits if "[h]e or she has left the employ of his or her last employing until voluntarily without good cause attributable to such employing unit"). Claimant appealed this decision to an administrative law judge (ALJ). Following a hearing, the ALJ made the following findings. Claimant worked for employer as a plant manager at a quarry in Swanton. He was called to the corporate offices in Colchester for a morning meeting on April 21, 2017. The president and vice president of the company held the meeting to address claimant's insubordination the previous day. Employer was prepared to fire claimant at the meeting but hoped that claimant would admit that he had behaved inappropriately the day before and commit to following directions in the future. The ALJ found that "[a]s long as the claimant apologized, he would continue in the position." Before the president or vice president had the opportunity to raise their specific concerns, claimant asked if the meeting was about the quarry or about him. When told that the meeting was about him, claimant "jumped to the conclusion he was being fired and stormed out of the meeting." He used profanity on the way out of the building.

Based on these findings, the ALJ concluded that claimant left his employment voluntarily without good cause attributable to his employer. The ALJ acknowledged the likelihood that given claimant's reaction at the beginning of the meeting, he would have been fired had the meeting continued. Claimant was not told that he was fired, however, and employer did not express its concerns about claimant during the meeting. Instead, claimant "got up immediately and left." Given this, the ALJ concluded that claimant initiated his separation from employment when continuing work remained possible. While his choice might have been a "good personal decision,"

the ALJ determined that it was not for good cause attributable to the employer. The ALJ thus sustained the claims adjudicator's determination.

Claimant appealed this decision to the Employment Security Board. A majority of the Board adopted the ALJ's findings and conclusions as their own. One Board member dissented. She argued that when an employee is separated from employment under ambiguous circumstances, the unemployment insurance law requires that unemployment benefits be allowed unless the employer can show that the separation was due to a claimant's voluntary resignation. Here, claimant admittedly stormed out of employer's office after a profane outburst, but given claimant's decades-long history of employment with employer and employer's apparent history of tolerating claimant's volatile behavior, the dissenting member did not believe that claimant's actions at the April 21 meeting demonstrated an unequivocal intent to quit his job. Claimant appealed from the Board's decision.

Claimant argues that he was fired and that he did not voluntarily quit. He points to evidence from employer, including several affidavits, to support his argument. Claimant also complains that the ALJ excluded several exhibits that he sought to include in the record.

On review, we defer to the Board's decision. Kelley v. Dep't of Labor, 2014 VT 74, ¶ 6, 197 Vt. 155. "We will uphold the Board's findings of fact unless they are clearly erroneous, and its conclusions if they are supported by the findings." Id. We agree with claimant that the Board erred here.

As we have explained, "[t]he Unemployment Compensation Act is a remedial law designed to remove economic disabilities and distress resulting from involuntary unemployment, and to assist those workers who become jobless for reasons beyond their control." Id. ¶ 8 (quotation omitted). It follows that "no claimant should be excluded unless the law clearly intends such an exclusion." Id. (quotation omitted).

If a claimant meets his or her initial burden of establishing "the basic elements of employment and termination," the "termination is presumed to be involuntary unless the employer fulfills its burden of proving the employee left voluntarily." Blue v. Dep't of Labor, 2011 VT 84, ¶¶ 7, 8, 27 A.3d 1096 (quotation omitted). This approach is "consistent with the broadly remedial nature of the unemployment compensation scheme." Id. If the employer shows that the employee voluntarily departed, "the burden is generally on the employee to prove that he or she quit for good cause attributable to the employer." Id. ¶ 7. "In determining whether a separation from employment is a discharge or a voluntary quit, we look to the intent of the parties at the time of the separation." Kelley, 2014 VT 74, ¶ 10.

As in Kelley, "[t]his case turns upon a common question in employment disputes: did the employee jump, or was [he] pushed?" Id. ¶ 1. The record here shows that employer was prepared to fire claimant at the meeting. The president and the former president of the company provided sworn affidavits and testified to this effect at the hearing. The president of the company stated in his affidavit that claimant had a history of resisting changes and adjustments in plant design, operation, and equipment. The president wanted to make changes to the Swanton plant and engaged in a test run of these changes on April 17, 2017. According to the president, claimant returned the controls to their original settings, which the president considered insubordinate. The

president decided at that point that unless claimant changed, he would be fired. He set up a "final meeting" with claimant. The president stated that he planned to detail at the meeting claimant's history of "insubordination and disrespect" and identify "his refusal to accept the necessary changes as the reason why his employment could not continue." The president was prepared, upon firing claimant, to provide claimant with the title and registration to a new truck that the company had purchased and brought this paperwork with him to the meeting. The president averred that if claimant had "acknowledged his reluctance to accept the proposed changes, apologized for his disrespect, and agreed to work with the changes and express[ed] his sincere desire to work with us and help in adopting the changes, his employment would have continued." The president stated, however, that this "was not [claimant's] response." According to the president, "I never had a chance to tell him he was terminated, but his reaction indicated that he was voluntarily surrendering employment."

The former president of the company, who is the current president's father, also submitted an affidavit. He stated that he had previously ignored claimant's "unwillingness to adapt to change," and in the past had "walked away rather than terminate" claimant. After the incident at the Swanton plant on April 17, 2017, the former president stated that things reached the point where he "could not deal with [claimant's] attitude and disrespect any longer." According to this witness, "[t]hat led to a decision by [the current president], in light of [claimant's] long-term pattern of activity and unwillingness to adapt, that he would be terminated, and we would do that at a meeting held at our corporation's offices in Colchester." Like his son, the former president indicated that had claimant apologized at the meeting and agreed to change, "the meeting would not have ended the way it did and [claimant] would still be an employee of the corporation."

Claimant testified that he had been told that the Colchester meeting would be about going over plant modifications. He was surprised when the meeting began to focus on him. He stated that at that point, he got up and said that he had heard enough, shook the president's hand, and ran downstairs. He testified that he fled because he knew he was being fired. Claimant testified that he had never before had a meeting at the corporate headquarters and that he knew that his prior boss had been fired when he was around the same age as claimant. Claimant left the meeting believing that he had been fired. The company president testified that he "[n]ever had [the] opportunity" to tell claimant that he was fired because claimant left the meeting.

We agree with the dissenting Board member that the facts here, as found by the Board, do not show that claimant voluntarily chose unemployment over employment. The fact that claimant became upset and stormed out of a meeting does not mean that he quit or that he "initiated this separation from employment when continuing work was still a possibility." Claimant never stated that he quit, and employer had long tolerated his "insubordination" in the past. Claimant testified that he left the meeting because he believed he was being fired. This was not mere speculation. Certainly, at the moment of claimant's departure from the meeting, the condition predicate to his firing, as stated by both the former president and the current president, was fulfilled. Claimant did not apologize for his behavior at the plant, as employer sought, nor did he demonstrate a willingness to change his behavior going forward. The circumstances here were equivocal, with claimant entitled to a presumption that the termination was involuntary. It follows that employer failed to meet its burden of showing that claimant voluntarily quit his position. See In re M.L., 2010 VT 5, ¶ 26, 187 Vt. 291 (explaining that if "testimony of both parties is in balance, or equally probable, then the moving party will have failed to sustain the required burden" (quotation

omitted)); see also Metro. Stevedore Co. v. Rambo, 521 U.S. 121, 137 n.9 (1997) ("[T]he preponderance standard allows both parties to share the risk of error in roughly equal fashion, except that when the evidence is evenly balanced, the party with the burden of persuasion must lose." (quotations and citations omitted)). We therefore reverse the Board's decision and remand for additional proceedings. Given our conclusion, we do not reach claimant's assertion that the ALJ erred in refusing to admit several of his exhibits. On remand, the parties will have the opportunity to address whether claimant was "discharged . . . for misconduct connected with his . . . work." 21 V.S.A. § 1344(a)(1)(A). We note that the burden of proving misconduct "rests squarely on the employer." Johnson v. Dep't of Emp't Sec., 138 Vt. 554, 555 (1980).

Reversed and remanded for additional proceedings.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice