## INTRODUCTION

This is a small case; yet it is an important one. It is small only in the sense that a modest amount of unemployment benefits are directly at stake. It is important in the sense that, absent legislative intervention — which, frankly, is unlikely — this case will determine whether a 32-year-old Department of Labor practice of mechanically treating all quits based upon the claimant's assessment of an employer's future action as an inadequate basis to terminate employment and hence categorically denying all Vermont workers in that status unemployment benefits. This practice, a "rule of thumb", is hereinafter referred to as the "future possibility rule".

The appellant in this case, Katherine St. Martin, was employed by H&B LeFevre EMS, LLC for a period of nearly two years.[1] Her job was preparing the company's weekly payroll. After a very significant history of financial difficulties, the company's president and owner, Mary Hoyt, told Ms. St. Martin on Wednesday, October 13, 2010 that the company did not have enough money to meet the payroll for the previous week. She instructed Ms. St. Martin not to submit the payroll to the employer's payroll company. The direct consequence of this instruction — painfully obvious to Ms. St. Martin not only because of the nature of her job but also because of her long and intimate familiarity with the company's financial difficulties — was that Ms. St. Martin and her co-workers would not be paid for work they had performed during the previous week nor for the current week's work.

[1] For the Court's convenient reference, the appellant sets forth here a short summary of the facts, taken from the Statement of Facts as set forth in her Principal Brief.

The next day, Thursday, October 14, 2010, was pay day. After efforts to borrow money failed, Ms. Hoyt also told Ms. St. Martin that she was closing the company, which she did later that same day. Not surprisingly, when effectively told that she was not going to be paid for the work she had done a week earlier and would likely not be paid for the work she was doing that week, Ms. St. Martin began to pack up her things and leave.

At the urging of the company's chief operating officer, Ms. Hoyt then allowed Ms. St. Martin to submit the payroll. Within minutes, Ms. Hoyt had second thoughts and went in to Ms. St. Martin's office to stop her. On learning that the payroll submission had already completed, Ms. Hoyt began cursing and said that the checks would bounce. She then tried to persuade Ms. St. Martin to stay, promising that there would be money for the payroll, at least for the office staff. But Ms. St. Martin reasonably believed what Ms. Hoyt had told her, that the checks would bounce and that she would therefore not be paid. She left.

As it happened, the payroll checks cleared, but a reasonable person could have concluded, as Ms. St. Martin did conclude, that she would not be paid for the week's work she had completed nor for the current work week.

Citing *Kasnowski v. Department of Employment Security,* 137 Vt. 380, 382, 406 A.2d 388 (1979), the Administrative Law Judge and the Employment Security Board denied Ms. St. Martin's claim for unemployment compensation benefits, concluding, based on the Department's future possibility rule, that she quit her employment without good cause attributable to the employer.

## ARGUMENT

### I. The Chief Administrative Law Judge and the Employment Security Board erred in reading this Court's decision in *Kasnowski v. Department of Employment Security* too broadly.

The decisions of the Chief Administrative Law Judge and the Employment Security Board were based upon an overbroad reading of *Kasnowski.* The Administrative Law Judge wrote that the Court in *Kasnowski* "ruled that '[a] quit for something that is only a possibility and has not yet actually occurred does not justify an award for benefits.'" Printed Case at 055, quoting *Kasnowski v. Department of Employment Security,* 137 Vt. at 382, 406 A.2d at 389.

While the Administrative Judge quoted *Kasnowski* accurately, he erred in concluding that the quoted language was the Court's "ruling." He failed to accurately distinguish between the holding of the case, which was that the prediction at issue there — that the employee could not be guaranteed a seven-hour break between shifts — did not justify a quit, and the Court's rationale. It is fundamental that the holding of a court of last resort is binding on a lower tribunal. *State v. Ball,* 123 Vt. 26, 28-29, 179 A.2d 466 (1962) (holding of U.S. Supreme Court on a matter of U.S. constitutional law acknowledged as binding on Vermont Supreme Court). It is the Court's holding, not its rationale, that binds a subsequent decision-maker. *See, e.g., Cronin v. State,* 148 Vt. 252, 531 A.2d 929 (1987) (distinguishing between the holding of a case and its rationale).

The remedial nature of the Unemployment Compensation insurance program underlines the real importance of this case. The objective is to provide a basic level

of economic security to Vermont workers. The effect of the future possibility rule, as applied by the Department of Labor, is inconsistent with that objective as to employees who are employed by irresponsible employers who threaten to take an employee's labor without compensation.

There is no dispute about the underlying policy of the Unemployment Compensation program as interpreted by this Court. The Department acknowledges that whether an employee had good cause to voluntarily leave employment (and thus qualify for benefits) is governed by "a reasonable person standard." Appellee's Brief at 10, citing *Isabelle v. Department of Employment and Training,* 150 Vt. 458, 460, 554 A.2d 660 (1998). The question is "under the circumstances unique to each particular case, what would a reasonable person do?" *Id.*

The Department's brief mouths the right language, that the reasonableness of each claimant's decision to voluntarily leave employment must be assessed under the particular circumstances of the individual case. Nonetheless, the decisions by the Chief Administrative Law Judge and the Employment Security Board in this case make it clear that the Department applies the future possibility rule as a categorical rule and not as simply a factor to be taken into account in determining reasonableness. It applies the rationale of *Kasnowski* as if the future possibility rule — that a quit for something that has not actually occurred does not ever justify an award of benefits — were a direct statutory mandate. *See* Appellee's Brief at 11. But the rationale of *Kasnowski* is no statutory mandate. It is the explanation of a Justice of this Court for a decision in a particular case that a particular justification

for quitting a job in a particular set of circumstances was not enough to reasonably justify quitting so as to be eligible for benefits.

Simple logic demonstrates that an absolute and categorical interpretation of the decision cannot have been intended. If that was the intention, even the most absurd application of the rationale must be accepted. Would the Department have us accept the proposition that an employee who is **credibly** instructed that he or she must later today engage in heinous criminal behavior must stay on the job and find out if the employer has changed its mind? Such an interpretation of *Kasnowski* is unreasonable. Common sense demands that the rationale of *Kasnowski* be subject to reasonable limitations.

## II. The Department does not contest Ms. St. Martin's contention that this case is distinguishable from *Kasnowski.*

The Department's brief is revealing as much for what it does not say as for what it does. The Appellant's principal brief distinguishes this case from *Kasnowski* on three grounds.

First — that the prediction in *Kasnowski* was not, like this one, about a fundamental term of employment, but was rather about a single event and concerns the interpretation of an uncertain prior agreement.

Second — that what the Department treats as the "rule" of *Kasnowski* is not the holding of the case but was merely part of its rationale, and was expressly

limited to the facts of that case.[2]

Third — that the prediction in question here is of significantly greater reliability than that at issue in *Kasnowski.* The prediction in that case was no more than the employer's mere refusal to **guarantee** a seven-hour break between shifts. In this case, the employer said — and said repeatedly — that she would not and could not pay Ms. St. Martin for her previous and ongoing work.[3]

The Department's brief fails to challenge any of these three distinctions and thus implicitly concedes that *Kasnowski* does not require the decision as was rendered in this case.

Instead, the Department jumps to a consideration that is not properly relevant to its determination. It points out that, had Ms. St. Martin waited one more day, she would have seen that her payroll check would clear. Appellee's Brief at 12. The Department has the grace to concede that this is hindsight which, as we all know, is 20-20. *Id.* Whether the payroll checks cleared is logically and necessarily irrelevant to Ms. St. Martin's decision, which was made at a point when it was reasonable for her to believe that she would not be paid for her work.

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[2] As Mr. Justice Larrow wrote, "**in this situation** the quit was voluntary and for personal reasons not attributable to the employer." *Kasnowski v. Department of Employment Security,* 137 Vt. at 390 (emphasis added).

[3] As explained in the Appellant's Principal Brief, Ms. St. Martin had substantial personal knowledge to support recognition that this appraisal of the employer's finances was well grounded in the facts.

## III. If the Court concludes that the future possibility rule of *Kasnowski* binds the Department, it should either limit the decision to its facts or overrule the decision.

If, for any reason, the Court agrees with the Department that its appreciation of the future possibility rule of *Kasnowski* is correct and binding on the Department, the Court should exercise its discretion to relieve the Department of the obligation to follow a rule that is out of step with the underlying policy of the law regulating the Unemployment Compensation program.

The Department's future possibility rule is a severe one. It requires an employee who is credibly and repeatedly told that she will not be paid to continue to work and find out later whether her labor has been gambled in vain. Such a policy is hardly consistent with the remedial purposes of the unemployment compensation scheme. It fails to acknowledge the harsh reality that many employees are but a single paycheck away from financial ruin. It requires such employees to risk the limited financial security they may have upon the hoped-for honesty and good judgment of employers who have demonstrated that they carry neither characteristic. One effect of a more generous and fact-specific rule would be to encourage employees to act reasonably to find better and more secure employment, a policy that benefits both the employees and responsible employers.

Courts do not lightly overrule their own prior decisions. However, as the Appellant's Principal Brief makes clear, the so called "future possibility rule" is not really a rule of this Court. On a number of occasions, detailed in the Appellant's

Principal Brief at 14-15, this Court has not reflexively followed this rule in all of its cases. A decision riddled with exceptions calls out for reconsideration.

Moreover, the future possibility rule is inconsistent with the broader rule, acknowledged by both parties to this case, that whether an employee has good cause to voluntarily leave employment (and thus qualify for benefits) is governed by "a reasonable person standard." *Isabelle v. Department of Employment and Training,* 150 Vt. at 460, 554 A.2d at 661.

The Court should follow the reasonable person rule and should limit *Kasnowski* to its facts or, in the alternative, should expressly overrule it.

## CONCLUSION

Courts are not always in a position to do what is "right." In a democratic system, respect for the popular branches of government often, perhaps even usually, requires that courts defer to policy decisions made by elected officials even if a judge's own view of what would be fair in particular circumstances would be quite different.

This is not such a case. The policy at issue here is a bureaucratic and categorical interpretation of one of this Court's own prior decision. It is true that this Court gives deference to Department's decisions within its realm of expertise. But the Department has no greater expertise, in fact it has lesser expertise, than the Court does in applying the reasonable person standard to particular facts. Here the Court should follow its own view of what is fair. It should reject the unstated, but implicit justification for applying a categorical rule to such a case that it is

administratively convenient to apply the *Kasnowski* rationale as if it were an absolute.

The "future possibility rule" is not even the holding of a prior decision of this Court. The Department was free to disregard it in applying the law to this case. It failed to do so. This Court is not obligated to follow the rationale of *Kasnowski* here. It should decline to do so.

The decision of the Employment Security Board should be reversed and the case remanded to the Board for the award of benefits.

Dated at Burlington, Vermont, this 5th day of July, 2011.

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