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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2667-15T4

JAMIELYN GERARD,

Appellant,

v.

BOARD OF REVIEW and  
SURFACE SOURCE  
INTERNATIONAL, INC.,

Respondents.

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Argued August 8, 2017 – Decided September 12, 2017

Before Judges Hoffman and Currier.

On appeal from the Board of Review, Department  
of Labor, Docket No. 021,548.

Michael DiChiara argued the cause for  
appellant (Krakower DiChiara, LLC, attorneys;  
Mr. DiChiara, on the briefs).

Peter H. Jenkins, Deputy Attorney General,  
argued the cause for respondent Board of  
Review (Christopher S. Porrino, Attorney  
General, attorney; Melissa Dutton Schaffer,  
Assistant Attorney General, of counsel; Mr.  
Jenkins, on the brief).

Respondent Surface International, Inc., has  
not filed a brief.

PER CURIAM

Claimant Jamielyn Gerard appeals from the February 8, 2016 final agency decision of the Board of Review (Board), rejecting her claim for unemployment benefits. Claimant worked as an administrative assistant for Surface Source International, Inc. (SSI) from February 2008 until she sent an email resigning in April 2014. Claimant argues she had good cause to quit her job because her coworker continuously harassed her for over three years, and SSI failed to take effective steps to stop the harassment. We agree and reverse.

I.

Claimant filed for unemployment benefits on April 20, 2014. On July 13, 2014, a Deputy Director (Deputy) of the Division of Unemployment and Disability Insurance Services determined claimant disqualified for benefits on the ground she left work voluntarily without good cause attributable to the work.

Claimant appealed the Deputy's determination, and the Appeal Tribunal (Tribunal) held a hearing on July 10, 2014. Claimant testified that about a year into her employment, she found her "manager hooking up with the warehouse manager." After she confronted her manager about it, the warehouse manager "started having this vendetta against" her.

He would call me names; everything from, "Mama Gorda, you bitch, you . . . [.]" Many verbal names; anything he could say to hurt me. He

was commenting on the type of clothes I was wearing, the type of underwear I had on. He . . . stole personal property out of my desk, he vandalized my desk. He physically harassed me[.] [H]e touched me from behind, he had grabbed me. We . . . got into a physical altercation where he took me and slammed me into his desk.

Claimant further stated, "I was not physically injured, but yes . . . I did hurt." She did not call the police because her bosses "assured" her "that something like this would never happen again." She added that she did not file a police report "out of fear." Claimant said this happened "about three years ago." When she previously reported the warehouse manager touching her buttocks, her manager replied, "[T]hat's just how he is."

Claimant explained, "I went to . . . my boss and my manager, I explained what had happened, I was very upset, I was crying." Her bosses said their lawyers recommended installing "security cameras," but they never followed this advice. One of her bosses told her the warehouse manager "was warned, and if he did anything to me again[, ] he would be fired."

According to claimant, the warehouse manager continued to call her names, especially "Mama Gorda." He would swear at her, "just anything that hurts." She further testified, "And he has done so much things to me, and I have continuously met with them and spoke with them and told them all this, and . . . they never did anything to help the situation." SSI's owner told her "that

the devil he knows is better than the devil he doesn't know . . . even though he was harassing me and tormenting me."

Claimant further explained,

. . . I was so stressed from all of this that my health was deteriorating. I saw seven doctors in the past year, and I've spent like hundreds of dollars in co-pays because of all this stress, and my boss was accusing me of forging doctor's notes. And with all this happening I just needed to . . . take my health seriously[.] I was tired of being harassed, and so I resigned.

Claimant's symptoms included stomach problems, chest pain, and trouble sleeping; she saw various doctors, including a pulmonologist, a cardiologist, and a gastroenterologist. "[T]hey found nothing, and . . . all said that it was the stress from work."

By April 2014, claimant "was tired of being harassed," so she sent SSI's owner an email resigning, effective immediately. She did not quit earlier because she "really" liked the position; "[i]t's just every time [the warehouse manager] would do something to me[,] and I would have a meeting with them, . . . they would assure me that things were gonna get better, and they would for a couple weeks, and then it would just start back up again." She also explained that "it's hard to find work these days."

Claimant's manager was the employee representative during the hearing. She agreed claimant had reported the warehouse manager

physically and verbally harassed her. She said that "we would go to him, and he'd say he didn't do anything;" however, after the warehouse manager slammed claimant into his desk, "we had him sign a written warning for violence in the workplace." Additionally, "we offered the hidden cameras," but claimant "insisted that that was not necessary." She also testified that she verbally reviewed SSI's harassment policy with her employees, but she did not post any of the information at the facility nor did SSI have an employee handbook.

SSI's owner testified that he met with claimant after the warehouse manager slammed her into his desk, and he issued the warehouse manager a written warning that SSI would fire him "if there is any violence in the workplace" again. The owner also said claimant told him that she did not want him to install any cameras because "she felt uncomfortable with cameras." The owner claimed he did not know of any other incidents involving claimant and the warehouse manager. "[T]he only issues that were ever brought up to my attention were that [claimant] does not . . . get along with [the warehouse manager]. It was never brought to my attention that somebody saw something. It was never brought to my attention that there was further touching of any kind." He said he offered to pay for claimant's internet at home, so she could work there, but claimed she declined the offer.

The Tribunal accepted the testimony of claimant's manager and SSI's owner, and consequently found that "claimant never presented any issues or concerns to management after" they issued the warehouse manager a written warning about workplace violence. The Tribunal therefore concluded that claimant was "disqualified for benefits . . . , under [N.J.S.A.] 43:21-5(a), as she left work voluntarily without good cause attributable to such work." Claimant appealed and the Board remanded because "a complete and audible record of the hearing [was] not available for review."

The Tribunal held another hearing, and received testimony generally consistent with the first hearing; however, one new detail emerged. Claimant testified she had a meeting with her manager and SSI's owner in January 2014. At the meeting, she told them that the warehouse "always" made her "feel unsafe," and "it was getting worse." The owner then asked her "if . . . something would cause this behavior," apparently suggesting claimant may be doing something to elicit the warehouse manager's conduct. The owner told claimant she worked in "a small office and . . . needed to be able to deal with it." When claimant tried to express that she should not "have to work in an uncomfortable environment," the owner told her "to get over it and accept it." After this meeting, claimant said the warehouse manager continued to harass claimant "physically, mentally, sexually, and verbally." She recalled,

One day he'd be making cat calls and whistling at me, continuing to comment on how I looked, making sexually inappropriate comments, the next day calling me horrible names and verbally harassing me. . . . He stole things out of my desk.

Claimant told her manager, but "she did nothing."

At some point thereafter, the warehouse manager "poured [something on the] side of [her] desk so that it would smell . . . . [H]e got caught . . . [and] had to pay a cleaning service to remove the smell and was fired." However, soon thereafter, SSI inexplicably rehired him, and told claimant "he won't do anything to you again." She told them that she "felt unsafe around him," but "they didn't really ask [her] opinion." Claimant testified the warehouse manager resumed harassing her until she resigned. At this hearing, claimant also explained that "Mama Gorda" meant "fat mama."

SSI's owner testified that he scheduled the January 2014 meeting because other employees were asking whether "everything was okay" with claimant. The owner said, "[W]e sat with [claimant] to make sure that . . . she was happy[, and] we did ask, and she said she was happy." In the next sentence, the owner qualified this statement by noting that claimant did express that she had a problem with the warehouse manager "whistling . . . in the warehouse." The owner said he then spoke with the warehouse manager, who admitted whistling, but said it was not directed at

claimant. The owner said he told the warehouse manager to stop whistling. At the close of the January 2014 meeting, the owner said he asked claimant "to adjust her attitude and become more of a team player[,] and we're a small operation[,] and everybody has to get along." She told him that "she'll never get along with" the warehouse manager. He said, "If anything else is to happen, put it in writing and let me know."

Following this second hearing, the Tribunal found that it could not "dispute the claimant's allegations regarding her problems she experienced with her co-worker during her employment period," but also noted that SSI's owner "testified . . . claimant never presented any problems after a meeting to discuss her attitude [in January 2014]." The Tribunal consequently found that "there is insufficient evidence to support . . . claimant's testimony [that SSI] failed to bring some resolution to the matter[;] therefore, [claimant] failed to meet the burden of proof requirement for good cause."

Claimant again appealed, and the Board remanded the claim for a third hearing, this time for the Tribunal "to consider medical evidence submitted by . . . claimant and to make a decision as to whether . . . claimant's leaving was with good cause attributable to work."



The Tribunal's third hearing lasted two days, March 18, and July 17, 2015. Claimant testified she had "horrible chest pains and . . . headaches" while she worked for SSI; she also had "stomach pains." She saw "a cardiologist, pulmonologist, gastroenterologist, and general practitioners" for these symptoms. The doctors could not find a medical explanation of her pain; her general practitioner told her "the only potential cause was work related stress." A social worker diagnosed her with post-traumatic-stress disorder. The social worker also "found [her] to be depressed . . . by [her] working conditions." After she resigned, claimant's pain "cleared up," and she no longer had "any health problems."

Claimant explained that she did not write her complaints down because she would directly report to her bosses in their offices. When she told them the warehouse manager "would do scary things in front of" her, her bosses said they "would take care of it," but they never did.

Claimant's social worker also testified. The social worker said that claimant "was depressed and overwhelmed by her working conditions." The social worker "found her committed to her job despite the abusive behavior by her co-worker, and not being protected by either her manager or her employer." She said claimant could not "tolerate the abuse" anymore, so she resigned.

Her bosses' failure to stop the harassment left claimant "feeling helpless and unprotected." She concluded that claimant did not have "any choice but to exit the situation." She testified that "women in these situations take a long time to get the courage to act and often appear sudden when, in fact, it was a building situation."

The Tribunal "acknowledged . . . claimant's former co-worker exhibited inappropriate behavior towards her during her employment period," but rejected "claimant's accusation that management failed to provide some resolution regarding her concerns as reasonable." Instead, the Tribunal found it reasonable that "management instructed . . . claimant to submit any future concerns or problems with her former co-worker in writing on [1/16/14].<sup>1</sup> The claimant never presented any issues regarding the employee." The Tribunal therefore concluded that "[t]his was a personal reason and was not attributable to the work."

Claimant again appealed, and on February 8, 2016, the Board affirmed the Tribunal, noting its agreement "with the decision," after "a full and impartial hearing and a complete opportunity to offer any and all evidence." Claimant now appeals to this court from the decision of the Board.

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<sup>1</sup> The opinion incorrectly set forth the date 1/16/15.

## II.

The Unemployment Compensation Act (Act), N.J.S.A. 43:21-1 to -24.30, provides that an individual shall be disqualified for benefits if "the individual has left work voluntarily without good cause attributable to such work." N.J.S.A. 43:21-5(a). "'[G]ood cause attributable to such work' means a reason related directly to the individual's employment, which was so compelling as to give the individual no choice but to leave the employment." N.J.A.C. 12:17-9.1(b). If a claimant resigned "for 'good cause attributable to [the] work,' [s]he is eligible for benefits, but if [s]he left for personal reasons, however compelling, [s]he is disqualified under the statute." Utley v. Bd. of Review, 194 N.J. 534, 544 (2008). "The burden of proof is on the claimant to establish good cause attributable to such work for leaving." N.J.A.C. 12:17-9.1(c).

Fundamental principles of law guide our decisions governing unemployment compensation. The Legislature designed the Act primarily to lessen the impact of unemployment that befalls workers without their fault. Brady v. Bd. of Review, 152 N.J. 197, 212-13 (1997). "The public policy behind the Act is to afford protection against the hazards of economic insecurity due to involuntary unemployment." Yardville Supply Co. v. Bd. of Review, 114 N.J. 371, 374 (1989) (alteration in original). Unemployment

compensation law is "remedial in nature . . . [and] must be liberally construed in light of [its] beneficent purposes." Teichler v. Curtiss-Wright Corp., 24 N.J. 585, 592 (1957).

We exercise limited review of administrative agency decisions. Brady, supra, 152 N.J. at 210. We are bound to affirm the agency's determination if reasonably based on proofs. Ibid. "[T]he test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the factfinder could reasonably so conclude upon the proofs.'" Ibid. (quoting Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985)). However, we may intervene if the administrative agency's action was arbitrary, capricious, or unreasonable, or it was "'clearly inconsistent with its statutory mission or with other State policy.'" Ibid. (quoting George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994)).

"An individual shall not be disqualified for benefits for voluntarily leaving work if he or she can establish that working conditions are so unsafe, unhealthful, or dangerous as to constitute good cause attributable to such work." N.J.A.C. 12:17-9.4.

In essence, the Tribunal disqualified claimant not on the basis of whether the harassing conduct occurred, but rather on the basis that she did not first make a written complaint before

resigning, notwithstanding her many verbal complaints, and did not specifically identify her reason for resigning in her last email to SSI.

Initially, we conclude that the Tribunal's finding ignores the uncontroverted testimony of claimant regarding the long-term harassment she endured. Further, claimant complained to SSI, and received assurance that SSI would remedy the situation; however, SSI failed to take effective remedial steps, and the harassment continued. Instead of properly addressing the problem, SSI's owner made a request of claimant, the victim of the harassment, "to adjust her attitude," and to register future complaints in writing.

Claimant was not required to make continuous complaints. In Condo v. Bd. of Review, supra, 158 N.J. Super. 172, 173 (App. Div. 1978), the claimant complained to his manager about his co-worker's threat of physical violence, and despite a warning, the co-worker continued the threats. The claimant did not bring additional complaints, which the Tribunal and Board found as a basis to deny benefits. Id. at 173, 175. We reversed, holding that the failure to continue to complain did not provide a valid basis to disqualify the claimant. Id. at 175-76.

In Brady, the Court interpreted "good cause" for leaving employment as "cause sufficient to justify an employee's

voluntarily leaving the ranks of the employed and joining the ranks of the unemployed." Brady, supra, 152 N.J. at 214 (quoting Domenico v. Bd. of Review, 192 N.J. Super. 284, 287 (App. Div. 1983)). This court held in Domenico that good cause must be compelled by "real, substantial and reasonable circumstances not imaginary, trifling and whimsical ones." Domenico, supra, 192 N.J. Super. at 288. Whether an employee has good cause for terminating their employment is viewed through the lens of "ordinary common sense and prudence." Zielenski v. Bd. of Review, 85 N.J. Super. 46, 52 (App. Div. 1964).


After considering the testimony from the hearings, we conclude that claimant resigned from her employment with SSI for good cause attributable to the work. Claimant legitimately believed that the work environment was harmful to her health. Given the previous assault, and continuing harassment, her belief was premised in fact and was not "imaginary, trifling, and whimsical." Domenico, supra, 192 N.J. Super. at 288. In sum, claimant left her employment out of a genuine and reasonable concern for her personal health and subsequent to SSI's failure to take reasonable and promised steps to ensure the harassment ended.

The Board has the "authority to engage in a plenary, [de novo] review of the evidentiary record; i.e., to make findings

independent of those made on the Appeal Tribunal level, and to conduct further evidentiary hearings." Messick v. Bd. of Review, 420 N.J. Super. 321, 326 (App. Div. 2011). Here, the Board chose not to do so. Rather, the Board affirmed and adopted the findings of fact of the Tribunal. In the absence of making independent findings, the Board's conduct is measured by that of the Tribunal. In adopting the Tribunal's findings disqualifying claimant, we hold the Board acted arbitrarily and capriciously.

Reversed and remanded for a determination of benefits. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

  
CLERK OF THE APPELLATE DIVISION