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ARKANSAS COURT OF APPEALS

DIVISION II
No. E12-9

CHRISTY S. PEPPER APPELLANT V. DIRECTOR, DEPARTMENT OF WORKFORCE SERVICES APPELLEE	**Opinion Delivered** October 31, 2012 APPEAL FROM THE ARKANSAS BOARD OF REVIEW [NO. 2010-BR-1168] REVERSED AND REMANDED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order of the Board of Review denying the claimant/appellant unemployment benefits based on a finding that she quit her previous employment voluntarily and without good cause connected with the work. Appellant argues that the Board erred in finding that she left her last employment without good cause. We agree, and we reverse.

Pursuant to Ark. Code Ann. § 11-10-513(a)(1) (Repl. 2012), an individual shall be disqualified for benefits if she voluntarily and without good cause connected with the work left her last work. Good cause is that which would reasonably impel the average able-bodied, qualified worker to give up her employment. *Swain v. Director*, 102 Ark. App. 171, 283 S.W.3d 603 (2008). A determination of good cause, which is usually a fact question within the province of the Board of Review, depends on the good faith of the employee, including a genuine desire to work and to be self-supporting, and also on the reaction of the average employee under the circumstances. *Id.* On appeal, the findings of fact of the Board of

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Review are conclusive if they are supported by substantial evidence. *Terravista Landscape v. Williams*, 88 Ark. App. 57, 194 S.W.3d 800 (2004). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

Here, the Board found that, in October 2008, appellant began working as a dental assistant for Wendell D. Garrett, Jr., DDS. During the next summer, appellant asked Dr. Garrett to stop making sexually inappropriate comments in front of patients when, after a tooth extraction, Dr. Garrett told a twelve-year-old girl to use the gauze he provided "like a sanitary pad." Appellant asked him to never make such statements to a child again, and Dr. Garrett complied. Dr. Garrett sent emails with sexual content to appellant, but stopped sending them when appellant asked him to do so in September 2009. The Board found that, also in September 2009, Dr. Garrett removed the adult magazines he had placed in the rooms in response to appellant's complaint to his head assistant; that Dr. Garrett made statements to his patients that appellant felt were sexually inappropriate; that Dr. Garrett made statements about appellant in front of patients that appellant felt were sexually inappropriate; that appellant felt that Dr. Garrett was pinning her inside the rooms by standing in the doorways; and that appellant quit without first telling Dr. Garrett that she was considering doing so. The Board reasoned that, because appellant had only complained to him about his sexual statements once, in the summer of 2009, and because Dr. Garrett had stopped sending appellant sexual emails promptly on request and had removed the adult magazines on request, appellant had failed to show that it would be futile to further complain to Dr. Garrett about his sexual statements. The Board found that appellant had quit voluntarily without good

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cause connected to the work because she did not further complain to Dr. Garrett before quitting.

In a similar case involving offensive workplace behavior, we held that two complaints regarding ongoing harassment were enough to preserve an employee's job rights, overturning the Board's finding that it would not have been fruitless to complain about a third instance of abuse because the abuse had abated somewhat after she made two prior complaints. *Swain v. Director*, *supra*. In *Swain*, we expressly held that the reasoning employed by the Board was fundamentally flawed and erroneous. The Board has employed identical reasoning in the present case.

Moreover, the factual findings made by the Board in this case are not supported by substantial evidence. The Board found, and the employer himself admitted, that appellant had also asked him to stop making inappropriate sexual comments in front of patients in the summer of 2009. Although the Board found that the employer was responsive to these requests and stopped the sexual harassment, at the hearing the employer admitted making inappropriate sexual comments in front of patients as late as December 9, 2009, when he "made statements about [appellant] being busy with her husband because he had been out of town for work." Appellant quit just over one month later, on January 13, 2010.

Viewing the evidence in the light most favorable to the employer, it is plain that, although the employer did comply with requests to stop sending sexual emails and to remove the Playboy magazines, by his own admission, he continued making inappropriate sexual remarks regarding appellant in front of patients. The Board could not, on this record,

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reasonably find that appellant failed to preserve her job rights. The law does not require a worker to exhaust every possibility in an effort to rectify mistreatment and abuse. *Swain v. Director*, *supra*. As we did in *Swain*, we reverse and remand for the Board to enter an award of benefits.

Reversed and remanded.

ABRAMSON and MARTIN, JJ., agree.

Robert L. Depper, Jr., for appellant.

Phyllis Edwards, for appellee Artee Williams, Director of Department of Workforce Services.