SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

P.O. BOX 746
COURTHOUSE
GEORGETOWN, DE 19947

David C. Hutt, Esquire
Wilson, Halbrook & Bayard
107 West Market Street
P.O. Box 690
Georgetown, DE 11947

Victoria L. Turner
954 Cricket Hollow Lane
Milford, DE 19963

Michael J. Rusie, Esquire *of counsel*
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215

Re: ***Victoria Turner v. Unemployment Insurance Appeals Board***
C.A. No. 03A-05-002-RFS

Date Submitted: November 7, 2003
Date Decided: February 27, 2004

Dear Counsel and Ms. Turner:

Claimant, Victoria Turner, appealed a decision of the Unemployment Insurance Appeal Board (the "Board") which disqualified her from receiving unemployment benefits. The Board's decision is affirmed for the following reasons.

STATEMENT OF THE CASE

The claimant, Victoria L. Turner ("Turner"), was employed as a hostess and a server at Bob Evans Restaurant in Lewes, Delaware, beginning on September 10, 2001. On December 15, 2002, Turner quit her job upon giving two weeks notice and after having completed that two week period. She claims that she was stressed and humiliated from constant harassment about her hair. Her doctor had also recently diagnosed her with high blood pressure. Ms. Turner has a

pituitary tumor for which she must take medicine that causes hair loss. As a result, she wears a hairpiece.

On September 21, 2001, Turner's general manager spoke to her about confining her hair. It was unclear whether she was working as a hostess or as a server at this point. According to Bob Evans' policy, a server must wear his or her hair "confined" so as to keep it away from the food. The handbook regulates confinement of hair, stating "[p]onytails or braids may not be worn below the collar," and:

> It should be combed away from the face so not to fall forward over the face while performing job duties. It [sic] hair is excessively teased it should be kept to a minimum for body and shape only. The following hair accessories are accepted [sic] a plain barrette or comb, one headband in gold silver or shell with no ornamentation including bows, no more than two combs or barrettes.

Referee Appeal Hr'g. Tr. at 23.

When asked at the Board hearing about this subject, Tina Harrington ("Harrington"), the employer's representative, indicated Turner had not worn her hair confined. This was so that her hair was up when the curls were loose with hair falling near the food.

The general manager spoke to Turner again about her hair on December 12, 2001. On another occasion, she was sent home for not having it confined. In November of 2002, Turner was called into the manager's office and written up for not confining her hair after a customer complained on a comment card. Turner claimed she was humiliated when management questioned her in front of other employees about her hair. She complained about comments made to her for being sent home for violating this policy. She alleged trouble conforming to the hair requirements because of her balding and the hair piece. She submitted photos at the Board hearing of two other employees, possibly in the serving area or kitchen, wearing their hair

unconfined. Harrington testified at the Board hearing that she tried to work with Turner about confining her hair. She gave her a two week period and told her to try different styles.

In an unrelated incident, Turner fell at work and was not permitted to go home until the end of her shift. She did not file a worker's compensation claim about the incident, but she asserted a report was prepared. Turner went to a doctor who gave her notes limiting the type of work she could do. She charged harrassment those notes; her managers kept asking her when the doctor would release her. In response, Harrington claimed that Turner was generally late in bringing in the notes and that they excused her from more difficult work only until her next appointment. . Harrington stated that Turner did not bring in the new notes promptly after a doctor's visit but would bring them in a few days after the time period for the previous note had already expired.

Turner also claimed she was sexually harassed by a female shift assistant. When a coworker, Doug Dunlap ("Dunlap") was helping Turner with her work on a busy day, the shift manager, Bianca Albertson ("Albertson"), said, "Tori [Turner] ought to give you a blow job." Turner felt that this incident was part of a larger pattern of harassment. The comment was allegedly made in September, and Claimant gave her two weeks notice in early December. Turner never reported this incident to her superiors.

The Claims Deputy determined that Turner was disqualified from receiving unemployment benefits pursuant to 19 *Del. C.* § 3315 because she failed to show good cause for leaving her employment. That decision was appealed and heard by an Appeals Referee of the Division of Unemployment Insurance on January 27, 2003. The Referee affirmed the Claims Deputy's decision which was appealed to the Unemployment Insurance Appeal Board. The

decision was again affirmed after a hearing on April 16, 2003, and the appeal to this Court ensued. Adopting the facts and conclusions of the Referee as its own, the Board found, "claimant has not presented evidence that she was harassed over her hair; rather, employer was simply trying to work with her on a legitimate issue." Decision of the Appeal Bd. In addition the board stated, "nor did claimant adequately attempt to resolve her problems administratively before quitting." *Id.*

During the Appeals Referee hearing, Turner pointed out that she had subpoenaed two people (Albertson and Dunlap) who were not present. The subpoenas were sent to the two witnesses at their Bob Evans work address; however, they were sent back, apparently because the address was unknown. Turner asked what she could do about it, but the Referee chose to proceed. However, the option was reserved to continue the hearing later if the two witnesses were really necessary. Thereafter when the sexual comment was discussed, the Referee felt Dunlap and Albertson need not be subpoenaed because the comment had occurred back in September. Subpoenas were again mailed out via certified mail for the appeal before the Board, this time to home addresses and to the Bob Evans restaurant for Dunlap and Albertson. Also, Debby Giam Pietro[1] and Josette Williams, coworkers, also were subpoenaed to testify about Turner's resignation. All but one were returned with the designations of "no such number," "other," and "unclaimed." Dunlap testified briefly about the sexual comment.

Ms. Turner has asked the Court to review the board decision. She claims she had good cause to quit her job because she was discriminated against and harassed, that there was a substantial change in her working conditions, and that the environment was hostile and unhealthy. Claimant reports that the address she supplied for Bob Evans restaurant, to which the

subpoenas for Albertson and Dunlap were sent, was a valid postal address. She suspects they were deliberately returned.

The Court will address the issues of whether the Board had substantial evidence sufficient to support its finding that Turner did not have good cause to quit and that Turner did not exhaust her administrative remedies beforehand. Since Turner raises the issue of the returned subpoenas, the question whether the Board could nonetheless proceed, will be examined.

DISCUSSION

A. Standard of Review

The scope of review of findings of the Unemployment Insurance Appeal Board "is limited to a determination of whether there was substantial evidence sufficient to support the findings." *Unemployment Ins. Appeal of Dep't of Labor v. Duncan*, 337 A.2d 308 (Del. 1975). "'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Oceanport Indus. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994). It is said to be "more than a scintilla but less than a preponderance." *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981). In the absence of fraud the Appeal Board's findings are conclusive, and the Court is confined to resolving questions of law. 19 *Del. C.* § 3323(a). The Court will neither weigh evidence, determine credibility of witnesses nor make factual findings. *Coleman v. Dep't of Labor*, 288 A.2d 285, 287 (Del. 1972). But the standard of review does require the Court "'to search the entire record to determine whether on the basis of all the testimony and exhibits before the agency, it could fairly and reasonably reach the conclusion that it did.'" *Walker v. Unemployment Ins. Appeal Board*, 1995 WL 717614, at * 2 (Del. Super. Ct.) (citations omitted).

B. Good Cause to Leave Employment

19 *Del. C.* § 3315 provides:

> An individual shall be disqualified for benefits:
> (1) For the week in which the individual left work *voluntarily without good cause attributable to such work* and for each week thereafter until the individual has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned wages in covered employment equal to not less than 4 times the weekly benefit amount.

(Emphasis added.)

When an employee quits work voluntarily in order to receive unemployment compensation, she must demonstrate "good cause" to leave her employment. *O'Neal's Bus Service, Inc. v. Employment Security Commission*, 269 A.2d 247, 249 (Del. Super. Ct. 1970). The burden is on the claimant to establish the right to compensation. *Id*. "'Good cause' for quitting a job must be such cause as would justify one in voluntarily leaving the ranks of the employed and joining the ranks of the unemployed." *Id*. "[A] voluntary quit for good cause must be for reasons connected with the employment."[2] *Brainard v. Unemployment Comp. Comm'n*, 76 A.2d 126, 127 (Del. Super. Ct.1950).

Turner claims she had good cause to quit because she was discriminated against and harassed, that the working environment was hostile[3] and unhealthy, and that there was a substantial change in her working conditions. Where pervasive circumstances of this nature are proven, a person may have good cause to leave employment.[4] "However, "an employee does not have good cause to quit merely because there is an undesirable or unsafe situation connected with . . . his employment." *O'Neal's Bus Service, Inc.* 269 A.2d at 249.

Here, there was adequate evidence for the Board to find that Turner did not have good cause to quit her job. While her situation may have been uncomfortable or undesirable, that

discomfort did not rise to a sufficient level to show good cause. She attempted to claim a pattern of harassment; yet, Harrington demonstrated that Bob Evans tried to resolve issues with Turner. Turner told a tale of a work environment in which she was belittled and singled out because of management animosity. On the other hand, Harrington's testimony painted a different picture. Her story was that claimant was overly sensitive about her hair and easily took offense with company policy. This Court cannot choose sides in the dispute. The Board has weighed the credibility of the parties. As there were substantial facts to find Turner did not have good cause to quit, the Board's decision must be affirmed.

C. Exhaustion of Administrative Remedies

The employee must also show that she has made a good faith effort to exhaust all of her administrative remedies at the employment level. *See White v. Security Link*, 658 A.2d 619, 622 (Super. Ct. Del. 1994), *citing*, *Selk v. D.C. Dep't of Employment Serv.*, 497 A.2d 1056, 1059 (D.C.1985) ("He must first do something akin to exhausting his administrative remedies by, for example, seeking to have the situation corrected by proper notice to his employer."). The Board found that Turner was disqualified because she "did not adequately attempt to resolve her problems administratively before quitting." Decision of the Appeal Bd. In *Walker v. Unemployment Ins. Appeal Board*, 1995 WL 717614, at *4 (Del. Super. Ct.), the court noted:

> While 19 Del.C. § 3315 does not impose a strict requirement that an employee must exhaust all potential remedies before the employee may have good cause to quit, an employee does have an obligation to inform an employer of resolvable problems and to make a good faith effort to resolve them before simply leaving.

Citing, *Sandefur v. Unemployment Ins. Appeal Bd.*, Del. Super. Ct., C.A. No. 92A-01-002, Goldstein, J. (August 27, 1993) (Mem. Op.).

In this case, the evidence about the action Turner took to resolve her problems administratively is limited. Turner never reported the sexual harassment incident. Although a

store report was prepared about her fall, she never pursued it. A worker's compensation claim was not filed. There is no evidence that she ever spoke to any of her superiors about the incident or about not being allowed to go home. However, it is unclear what Turner did to try to resolve the problem of her hair. A Board representative asked her, "[d]id you before you quit go to someone and say I have been harassed?" Turner responded:

> I had said that to the managers and also my other co-workers were aware of what was going on because I had went into work one day back in November and Jed who is the manager, . . . said I was told that you cannot work looking like this. I was told you would have to go home. So I mean all of my co-workers heard that.

Bd. Tr. at 7.

This was the only time the issue was discussed in either the Board hearing or the hearing before the Referee. The claimant did not make a good faith effort to inform her employer of the sexual harassment incident. Nor does the record clearly show what, if anything, she did to resolve the problems with her hair and medical notes before simply leaving. This is claimant's responsibility, and the Board could find Turner failed to attempt to resolve her problems administratively.

Regardless of whether a good faith effort was made, the Board had substantial evidence to find Turner quit without good cause.

D. Due Process, Board Abuse of Discretion and Bias

Turner also complains about the returned subpoenas. The Board neither abused its discretion in conducting the hearing without the other three witnesses, nor did it violate Turner's due process rights. This is not a case in where Turner was not allowed to subpoena witnesses nor one where she was not permitted to question them at the hearing. *See, e.g., Caldwell v. Ramrattan*, 2003 WL 194734 (Del. Super. Ct.) (employer's due process rights found to have

been violated when president of company was not allowed to cross-examine witnesses). The subpoenas were sent out and returned. It was her responsibility to find valid addresses for her witnesses. At the Board hearing Turner made no mention of the missing witnesses, and she did not ask to postpone it.

Although Turner protested at the Referee's level, it was not an abuse of discretion to proceed. Both witnesses were to testify about the sexual harassment incident. The Referee had enough information to decide the point. The testimony of Dunlap and Albertson would have been cumulative to an issue that was neither the principal question presented to the agency nor crucial to establishing an alleged pattern of harassment. If there was error, it was harmless because Dunlap testified before the Board.

In sum, there was sufficient evidence before both the Referee and the Board for them to reach a decision; the witnesses' testimony would have been cumulative. Turner has not shown any prejudice by the absence of the witnesses. The Board has discretion in regulating how evidence is presented. See also *Hitchens v. Perdue, Inc.*, 1989 WL 89686 (Del. Super. Ct.). As that case observed: "The Board's review process is very informal. Therefore, if the Board could ascertain the substantial rights of the parties without the presence of certain witnesses, then they did not err as a matter of law." *Id.*, *citing*, U.I.A.B. Rule B, pp. 4-5.[5]

Turner also alleges the Board was biased in favor of Bob Evans when making its decision. Turner's Brief Appealing the Decision of the Bd. at 6 ("The findings of both the Referee and the Board seem slanted in favor of Bob Evans."). In *Kopicko v. Del. Dep't. Of Services for Children*, 2003 WL 21976409, at *5, the court stated:

> In *Withrow v. Larkin*, the U.S. Supreme Court held that a party asserting unconstitutional bias because an administrative agency exercises both adjudicative

> and investigative duties must overcome a presumption of honesty and integrity in those serving as adjudicators.

citing, 421 U.S. 35 (1975).

Here, as in that case, Turner has suggested the possibility of bias but has not overcome the presumption of honesty and integrity. She claims statements were left out of the transcript and that it is suspicious that the subpoenas were returned. Her speculation does not persuade this Court to doubt the honesty and integrity of the reporter or the regularity of the proceedings. Furthermore, the return of the subpoenas was well documented by the Board and the Referee. All were sent by certified mail and had the usual U.S. postal service stamp.

CONCLUSION

Considering the foregoing, substantial evidence supports the decision of the Board. Moreover, there was no legal error. Therefore, the Unemployment Insurance Appeal Board's decision disqualifying Turner from the receipt of unemployment benefits is affirmed.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. With her Answering Brief, Turner has included a letter written by Ms. Giam Pietro. In determining whether the Board had substantial facts, however, the Court may not consider the allegations of the letter because it is "limited to consideration of the record which was before the administrative agency." *Hubbard v. Unemployment Ins. Appeal Board*, 352 A.2d 761, 763 (Del. 1976) (citations omitted).

2. To the extent that Turner quit her job due to stress from her illness and high blood pressure, those reasons are not connected with her employment and cannot be justification for good cause for the purposes of qualifying her for unemployment insurance.

3. Turner cites a U.S. Supreme Court case, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, for the proposition that employers can be held liable for conduct of their employees if that conduct creates a hostile work environment. The issues in that case, however, are inapposite to the ones before the Court in this administrative appeal.

4. *See, e.g.*, *O'Neal's Bus Service, Inc. v. Employment Security Comm'n*, 269 A.2d 247 (Del. Super. Ct. 1970) (affirming Board decision that bus driver had good cause to quit when students constantly harassed and disturbed him while he was driving); *Short v. Unemployment Ins. Appeal Bd.*, 1993 WL 318860, at *2 (Del. Super. Ct. 1985) ("The term, 'good cause attributable to such work' contemplates such things as a substantial reduction in wages or hours or a substantial deviation in the working conditions from the original agreement of hire." Employee did not have good cause when he quit in order to obtain severance pay.).

5. In *Kopicko v. Del. Dep't. Of Services for Children*, 2003 WL 21976409, at *6, the court noted:

> As a general rule, the decision to permit or deny cross- examination of a witness as to specific information is committed to the sound discretion of the adjudicating authority so long as the authority does not exercise such discretion so as to defeat a party's right to effective cross- examination. In making such a determination, the adjudicating authority must consider: (1) whether the testimony of the witness is crucial; (2) the logical relevance of the specific evidence; (3) the danger of unfair prejudice, confusion of issues, and undue delay; and (4) whether the evidence is cumulative.

citing, *Garden v. Sutton*, 683 A.2d 1041, 1043-44 (Del.1996).
While this standard is a helpful guide and supports this Court's conclusions, the *Kopicko* court was considering a standard developed for the application of 29 *Del. C.* § 10125(b). As the *Hitchens* court noted, § 10125(b) applies only to those agencies listed in 29 *Del. C.* § 10161, of which the Unemployment Insurance Appeal Board is not one. Instead the Board has written Rule B pursuant to its power to determine the rights of parties under 19 *Del. C.* § 3321. Rule B provides:

> The Board of Appeals shall have the power to call, examine and

> cross-examine a witness and to request documentary evidence be admitted into the record. All parties to the hearing shall be given the opportunity to cross-examine witnesses, introduce documents and inspect documents.

Cited in Caldwell v. Ramrattan, 2003 WL 194734, at *3 (Del. Super. Ct.).