STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Allison E. Gutberlet, Appellant, vs. South Carolina Department of Employment and Workforce and Palmetto Lowcountry Behavioral Health, Respondents.	)	Docket No. 18-ALJ-22-0232-AP **ORDER**

STATEMENT OF CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to an appeal by Allison E. Gutberlet (Appellant) from a decision of the South Carolina Department of Employment and Workforce's (Department's) Appellate Panel, which held Appellant was indefinitely disqualified from receiving unemployment benefits upon finding she voluntarily quit her employment with Palmetto Lowcountry Behavioral Health (Employer) without good cause pursuant to section 41-35-120(1) of the South Carolina Code (Supp. 2018). The Administrative Law Court has jurisdiction to hear this matter pursuant to section 41-35-750 of the South Carolina Code (Supp. 2018). Upon consideration of the briefs and the Record, the Appellate Panel's decision is affirmed.[1]

BACKGROUND

Appellant worked for Employer from May 16, 2016, to January 17, 2018, most recently as an interim needs assessment director. On January 18, 2018, Appellant sent an email to the head of Human Resources (HR) stating that she was resigning effective January 18, 2018, because "management expectations violate regulatory requirements and management uses harassment, intimidation, and retaliation efforts to control employees."

After leaving her employment, Appellant filed an initial claims application with the Department. On the claims application, Appellant stated she quit or left her employment due to

[1] This case was decided without oral argument pursuant to Rule 39 of the Rules of Procedure for the Administrative Law Court.

working conditions. The Department conducted fact-finding, and both parties provided written responses.

In a letter mailed February 8, 2018, a Department claims adjudicator denied Appellant's claim, finding Appellant voluntarily severed employment without good cause under section 41-35-120 of the South Carolina Code. Specifically, the claims adjudicator found Appellant "resigned due to ethical concerns." On February 22, 2018, Appellant filed a Notice of Appeal with the Department's Appeal Tribunal seeking review of the claims adjudicator's decision.

An evidentiary hearing was held before a Tribunal Hearing Officer on April 5, 2018. Appellant appeared with three witnesses on her behalf.[2] Employer did not appear at the hearing. The Department's Agency Exhibit was entered into the record without objection, including Employer's fact-finding response. In the fact-finding response, Employer stated Appellant left work early on January 17, 2018, because she was ill. Also in its response, Employer reported that Appellant had told another staff member and a doctor that she was leaving on January 17th because she had been accepted to law school.

At the hearing, Appellant testified she left her employment because the CEO used intimidation tactics to encourage violations of a federal law, EMTALA[3], to enhance profits. Appellant explained she was verbally told not accept self-pay patients and, if a self-pay patient was accepted, to inform the CEO of the circumstances surrounding the acceptance. She stated this practice has been on-going since she was hired, but she did not raise it as an issue until she became the interim needs assessment director in September 2017. Appellant testified she expressed her concerns with the CEO and other members of senior management, but the practice continued. Appellant testified she "informally" raised the EMTALA violations with the HR in November, and HR told her to run her department how she wanted to run it. The CEO continued to encourage financial screening. Appellant testified there was no one above the CEO, like a board of directors, that she could go to with her concerns.

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[2] In her Reply Brief, Appellant argues the Department unfairly controlled the admission of evidence at the Appeal Tribunal because she prepared subpoenas for five witnesses, but the Appeal Tribunal limited her witnesses to three. Appellant did not raise this issue until her Reply Brief; therefore, this issue is not preserved. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) (holding "an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief").

[3] EMTALA is an acronym for the Emergency Medical Treatment and Labor Act passed by Congress in 1986 to prevent hospitals from transferring patients seeking emergency treatment based upon their ability to pay. 42 U.S.C. §1395dd.

Appellant testified she was not fully sure what repercussions she would face for EMTALA violations. She thought Employer would be fined and she would probably be fired. She also testified she could lose her license as a social worker.

The day Appellant resigned, she reported the violations to Employer's corporate chief compliance officer and she reported the violations anonymously to the Center for Medicare and Medicaid. Appellant did not report her concerns to corporate sooner because she had been previously reprimanded on January 5, 2018, by the CEO for contacting corporate when Employer did not timely fix a heating issue. Appellant testified the CEO reprimanded her by bringing her into his office with HR for an hour and twenty minutes during which the CEO aggressively waived a print-out at her and told her not to air the company's dirty laundry. Appellant explained that after her reprimand, she was fearful of the repercussions for reporting EMTALA violations to corporate. Appellant testified she spoke with HR after the meeting and HR told her to defer to the CEO in these situations.

At the time of her resignation, Appellant was in salary negotiations with the CEO about becoming the needs assessment director full-time. Appellant had been considering leaving her employment for several months but had not found another opportunity. She testified she was trying to resolve the EMTALA violations in her negotiations.

Appellant went on vacation from January 6-16, 2018, and returned on January 17th. Appellant testified that on January 17th the CEO walked into her office and acted "very cold" towards Appellant and she realized she was working in a hostile work environment.

Candace Harms, who works for Employer, testified she was not familiar with why Appellant quit. She testified she was under the impression that management wanted employees only to accept patients that were able to pay. She related that while the CEO was intimidating, he never did anything to her. She testified that when she brought a self-pay patient to the CEO, he told her to "use your best judgment." Ms. Harms related she is familiar with EMTALA and believed Appellant could lose her license for violations, but she was not aware of the reporting process.

Douglas Whittle, an assessment clinician for Employer, testified he understood that Appellant left her employment because she was fearful of being fired and had been scolded for taking an issue above the CEO. He testified Appellant was worried about losing her job, and he reassured her that he did not think her job was at risk. Mr. Whittle testified he was aware that

Appellant had an issue with EMTALA violations; and he stated he witnessed EMTALA violations. He testified that Appellant told him Employer had a board of directors.

Terri Grooms, Employer's financial counselor, testified she believed the reason Appellant left her employment was because she started law school. Ms. Grooms stated that Appellant never voiced any concerns to her about EMTALA violations. Ms. Grooms was not aware of any business practices relating to turning away self-pay patients. She was aware that Employer had a board of directors.

In response to follow up questions from the hearing officer, Appellant acknowledged that she had enrolled in law school, but she was enrolled part-time and was available to continue working. She also testified that she misspoke when she testified Employer had no board of directors.

In a decision mailed on April 6, 2018, the Appeal Tribunal affirmed the determination made by the claims adjudicator. The Appeals Tribunal found:

> Although the Claimant has proven she had concerns about healthcare law violations, she did not adequately address those concerns with the employer prior to her resignation. The Claimant did not take any steps to refer her concerns to the corporate compliance officer until after submitting her resignation notice. Although the Claimant indicated she felt threatened by the CEO after the last time she referred a concern to the corporate office, she was still engaged in the negotiation process for the permanent director position at the time she submitted her notice of resignation. The Claimant's actions suggest the CEO did not pose an immediate threat the Claimant. No evidence suggests it was imperative for the Claimant to resign before allowing the corporate office to fully investigate her concerns in an attempt to remedy the situation. Under these circumstances, the Claimant filed to exhaust all efforts to remain employed. Therefore, the Claimant voluntarily left employment without good cause connect to the employment.

Subsequently, On April 19, 2018, Appellant filed an appeal with the Department's Appellate Panel requesting review of the Appeal Tribunal's decision. Appellant submitted a written statement to the Panel.

In a decision mailed on May 29, 2018, the Appellate Panel affirmed the Appeal Tribunal. The Appellate Panel found the record established Appellant left employment "due to dissatisfaction with the nature of the work." Specifically:

> Although the claimant had concerns about which patients would be admitted to treatment, she has presented insufficient evidence to show a reasonable person would have resigned the position rather than continuing to work under the then-existing terms of work. She had reported her concerns about the CEO and self-pay patients and she was told to carry out admission in the manner she wanted.

> Instead of doing so, she elected to resign the position before bringing her concerns to corporate management. Further, the Claimant has failed to present sufficient credible evidence establishing the Employer's expectations regarding admissions were unreasonable. In addition, the Claimant has not shown that the reprimand regarding the heater issue was sufficient cause to become totally unemployed. There was no substantial or material change in the Claimant's conditions of employment. Therefore, we find the Claimant voluntarily left work without good cause attributable to the employment.

Thus, the Appellate Panel held Appellant was indefinitely disqualified from receiving unemployment benefits because she voluntarily quit employment without good cause pursuant to section 41-35-120(1) of the South Carolina Code. On June 27, 2018, Appellant filed a Notice of Appeal with this Court challenging the Appellate Panel's decision.

ISSUES ON APPEAL

1. Does the Appellate Panel's decision finding Appellant did not have "good cause" for leaving her employment violate Appellant's First Amendment rights?
2. Was the Appellate Panel's conclusion that Appellant did not have "good cause" for leaving her employment erroneous in view of the reliable, probative, and substantial evidence in the record?

STANDARD OF REVIEW

The Department is an "agency" under the Administrative Procedures Act ("APA"). *See Gibson v. Florence Country Club*, 282 S.C. 384, 386, 318 S.E.2d 365, 367 (1984) (finding that the Employment Security Commission, the predecessor of the Department, was an agency within the meaning of the APA). Accordingly, the APA's standard of review governs appeals from decisions of the Department. *See* S.C. Code Ann. §§ 1-23-380, 1-23-600(D) (Supp. 2017); *Gibson*, 282 S.C. at 386, 318 S.E.2d at 367; *McEachern v. S.C. Emp't Sec. Comm'n*, 370 S.C. 553, 557, 635 S.E.2d 644, 646-47 (Ct. App. 2006). Section 1-23-380(5) of the South Carolina Code (Supp. 2013) provides the standard used by appellate bodies to review agency decisions. *See* § 1-23-600(D) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). That section states:

> The court may reverse or modify the decision [of an agency] if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> (a) in violation of constitutional or statutory provisions;
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> (b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5).

A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). In applying the substantial evidence rule, "a reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)). When applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Co.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). Furthermore, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. *Grant v. S.C. Coastal Council*, 319 S.C 348, 353, 461 S.E.2d 388, 391 (1995). Finally, the party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. *Waters*, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

Under section 41-35-120(1), a claimant for unemployment compensation is indefinitely disqualified for benefits if the Department "finds [s]he left voluntarily, without good cause, [her] most recent work." The South Carolina Supreme Court has held "good cause" under section 41-35-120(1) means cause "attributable to or connected with" the employment. *Stone Mfg. Co. v. S.C. Emp't Sec. Comm'n*, 219 S.C. 239, 257, 64 S.E.2d 644, 647 (1951). "In order to constitute good cause, the circumstances which compel the decision to leave employment must be real, not

imaginary; substantial, not trifling; and reasonable, not whimsical." 81 C.J.S. *Social Security and Public Welfare* § 417.

First Amendment Rights

For the first time in this appeal, Appellant argues that working for Employer required her to "break multiple moral values thus constraining my ability to freely express my religion." Appellant identifies as a Christian. Although Appellant may have felt that her Christian values were compromised while working for Employer, "[i]t is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Appellant never raised this issue to the Appeal Tribunal or the Appellate Panel. Therefore, it is not preserved for this Court's review.

Substantial Evidence

Appellant contends substantial evidence does not support the Appellate Panel's finding that she did not have good cause for resigning. In support of her argument, Appellants relies on the Appellate Panel's definition of "good cause," which it defined in its decision as "a material substantial change in the conditions of employment, or other circumstances directly attributable to the employment, which would cause a reasonable person to become totally unemployed rather than continue working." Appellant claims that a "substantial change in the conditions of employment" was present because she had assumed the new role of interim needs assessment director and, only then, did she realize the extent of the alleged EMTALA violations. Appellant further contends that a reasonable person would become totally unemployed rather than continue working for and Employer and CEO who encouraged daily violations of federal law. Appellant cites to *Sviland v. South Carolina Employment Security Commission* in support of her argument. 300 S.C. 305, 308, 387 S.E.2d 688, 689 (Ct. App. 1989).

In contrast, the Department argues substantial evidence supports the Appellate Panel's decision because Appellant failed to definitively establish EMTALA is applicable and was violated, Appellant resigned although she was told to run her department as she thought best, and Appellant resigned before making Employer's corporate office notice of the issue and time to address this issue. I find substantial evidence supports the Appellate Panel's decision for the reasons stated below.

Initially, the Court finds that the Appellate Panel's definition of good cause is consistent with the South Carolina Supreme Court's definition of good cause in *Stone Manufacturing Company* because the Appellate Panel's definition recognizes that the cause of the unemployment must be attributable to the employment. 219 S.C. at 257, 64 S.E.2d at 647. Further, as recognized by the Appellate Panel, generally there must also be a precipitating event, or change in condition or circumstances of employment, that causes the unemployment. 81 C.J.S. *Social Security and Public Welfare* § 417 ("Whether an unemployment compensation claimant has shown good cause for quitting is to be analyzed in reference only to the event that directly led the claimant to quit and not to any other events or circumstances.").

Based upon this framework, I find substantial evidence supports the Appellate Panel's conclusion that "[t]here was no substantial or material change in the Claimant's conditions of employment." There is evidence in the record that Appellant's ascension to the roll of interim needs assessment director was a change in her conditions of employment or circumstances, but it was not the precipitating event in this case. In fact, there is evidence in the record that Appellant was concerned about Employer's ethically dubious and possibly illegal practices before she assumed her new role as interim director. Moreover, the record reflects Appellant continued to work for Employer for months, even after her elevation to interim director, despite her concerns about EMTALA violations (and her related licensure concerns). Appellant even engaged in negotiations to continue working for Employer on a full-time, permanent basis despite her concerns. It was only after Appellant was reprimanded by the CEO on January 5th for escalating the heating issue to corporate and the CEO acted "very cold" towards Appellant on January 17th that Appellant determined to resign on January 18th. Therefore, although Appellant's awareness of the scope of the alleged illegal activity may have increased after she assumed her new role, it did not precipitate her concerns about working for Employer. Rather, there is evidence in the record that the precipitating event for Appellant's resignation was the CEO's demeanor towards Appellant after she returned from vacation, not her concerns about EMTALA violations. *See* 81 C.J.S. *Social Security and Public Welfare* § 429 (noting criticism from a supervisor, "even if perceived as harsh or unfair," does not constitute good cause for leaving employment).

Next, I find substantial evidence does not support Appellant's contention that a reasonable person in her circumstances would have resigned from employment rather than continue working for Employer. While there is "generally good cause for leaving one's employment where the work

involves illegal or otherwise questionable practices," here, the evidence in the record is conflicting as to whether the violations were truly occurring and if Appellant truly left because of them. 81 C.J.S. *Social Security and Public Welfare* § 429. Specifically, Appellant provided testimony that she believed EMTALA violations were occurring on a daily basis and Mr. Whittle also testified he believed EMTALA violations were occurring. However, Appellant also testified HR told her to run the department as she believed it should be run, and Ms. Harms testified the CEO told her to use her best judgment with self-pay patients. Therefore, while the evidence certainly shows Appellant may have felt pressure to bend the rules, the evidence does not conclusively show that Employer was forcing Appellant to run her department in violation of the law. Accordingly, I find there is evidence in the record to support the Appellate Panels' finding that Appellant did not provide "sufficient credible evidence establishing the Employer's expectations regarding admissions were unreasonable." *See Waters*, 321 S.C. at 226, 467 S.E.2d at 917 (holding the fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence); *Grant*, 319 S.C at 353, 461 S.E.2d at 391 (holding the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact); *Milliken & Co. v. S.C. Employment Sec. Comm'n*, 321 S.C. 349, 350, 468 S.E.2d 638, 639 (1996) ("[O]n questions of witness credibility we defer to the judgment of the agency."). Appellant's concerns in this case appear to be similar to the claimant's in *Sviland* where the South Carolina Court of Appeals found the claimant's "fears the company engaged in conduct of questionable legality are insufficient in light of the fact no such illegality was shown." 300 S.C. at 308, 387 S.E.2d at 689.

Further, substantial evidence supports the Appellate Panel's finding that Appellant could have escalated her concerns to corporate before resigning to allow corporate to investigate and address her concerns. *See* 81 C.J.S. Social Security and Public Welfare § 429 ("According to some decisions, an employee does not have good cause to quit merely because there is an undesirable or unsafe situation connected with the employment but must do something akin to exhausting administrative remedies by, for example, seeking to have the situation corrected by proper notice to the employer."). Thus, there is evidence in the record to support the Department's decision that a reasonable person would have tried to resolve the issue by going to corporate before resorting to unemployment. Furthermore, although Appellant argued she was afraid to escalate the issue after her reprimand on January 5th for going to corporate, there was no evidence to show she was in

imminent danger of losing her job to justify resigning before attempting to escalate the issue. *See Ex parte S.C. Employment Sec. Comm'n*, 332 S.C. 286, 289, 504 S.E.2d 345, 347 (Ct. App. 1998) (citing with approval *In re Greene*, 176 A.D.2d 411, 573 N.Y.S.2d 999 (1991), which held an employee does not have good cause to leave employment in anticipation of discharge where no definite date for dismissal has been set).

Accordingly, I find substantial evidence supports the Appellate Panel's decision finding Appellant is disqualified from receiving benefits because she voluntarily quit her employment with Palmetto Lowcountry Behavioral Health without good cause pursuant to section 41-35-120(1). *See Friends of the Earth*, 387 S.C. at 366, 692 S.E.2d at 913 (holding a decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency); *Waters*, 321 S.C. at 226, 467 S.E.2d at 917 (holding the fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence).

ORDER

IT IS THEREFORE ORDERED that the Appellate Panel's decision is **AFFIRMED**.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 18, 2018
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair
Judicial Law Clerk

December 18, 2018
Columbia, South Carolina