

ARKANSAS COURT OF APPEALS

DIVISION II

No. E 12-6

SONYA M. McALISTER

APPELLANT

V.

ARTEE WILLIAMS, DIRECTOR,
DEPARTMENT OF WORKFORCE
SERVICES, AND CAR-MART

APPELLEES

Opinion Delivered May 16, 2012

APPEAL FROM THE ARKANSAS
BOARD OF REVIEW
[NO. 2010-BR-01351]REMANDED FOR FURTHER
FINDINGS**DOUG MARTIN, Judge**

Appellant Sonya McAlister worked at Car-Mart in Siloam Springs as an account representative in the collections department. On January 25, 2010, McAlister quit her job. The Department initially awarded benefits, but the Appeal Tribunal reversed that decision, finding that McAlister voluntarily left her job without good cause connected with the work. Thereafter, the Board of Review affirmed and adopted the Tribunal's decision. We remand for further findings.

The Board set forth the following findings of fact:

The claimant was employed as an account representative. On January 25, 2010 the claimant arrived at work late because of the weather. She met with the manager to discuss her failure to make the required calls the previous day because the claimant had left work early. Approximately 15 minutes after the meeting, the claimant told the manager she was quitting.

The Board concluded that, while McAlister alleged that Sean Miller, general manager at Car-Mart, harassed her "by threatening her discharge, requiring her to come to work in

bad weather, and demanding that she complete the necessary forms for FMLA leave,” these were requirements of McAlister’s employment. Thus, McAlister voluntarily left her job without good cause.

If so found by the Director of the Department of Workforce Services, an individual shall be disqualified for benefits if she, voluntarily and without good cause connected with the work, left her last work. Ark. Code Ann. § 11-10-513(a)(1) (Repl. 2002). Good cause is defined as “a cause that would reasonably impel the average able-bodied, qualified worker to give up his or her employment.” *Relyea v. Dir.*, 104 Ark. App. 235, 238, 290 S.W.3d 34, 36 (2008) (citing *Perdrix-Wang v. Dir.*, 42 Ark. App. 218, 221, 856 S.W.2d 636, 638 (1993)). Good cause is dependent not only on the reaction of the average employee, but also on the good faith of the employee involved, which includes the presence of a genuine desire to work and be self-supporting. *Id.* In addition, in order to receive unemployment benefits, an employee must make reasonable efforts to preserve her job rights. Ark. Code Ann. § 11-10-513(b).

We cannot reach the merits of the case because the Board failed to address and rule on McAlister’s claim that she was subjected to gender discrimination. *See, e.g., Lewis v. Dir.*, 84 Ark. App. 381, 141 S.W.3d 896 (2004) (holding that employer discriminated against appellant in regularly assigning him to a lesser-paying position that could be filled by other employees with equal or less seniority, thus reversing the Board’s decision). McAlister testified that Miller discriminated against her and other female employees at Car-Mart, and McAlister’s witness

Clay Conn offered testimony in support of McAlister's claim.¹ If proven, McAlister's claim of gender discrimination could constitute good cause for leaving her job at Car-Mart. See *Lewis, supra*.

McAlister, who lived in Jay, Oklahoma, called the general manager on January 25, 2010, asking whether she would have to come to work given the bad weather. While McAlister claimed that Miller threatened to fire her if she did not come to work that day, Miller denied it. Miller told McAlister that the roads were "fine," and McAlister informed him that she would be "a little late." When McAlister arrived at work, she told others that she had nearly slid into a tree. McAlister later testified that state troopers had advised everyone to stay off of the roads.

When McAlister clocked in, Miller asked to see her. The previous day, McAlister had left work early because of an emergency with her son. Miller asked McAlister what she had accomplished the day before and told her that she had made the fewest calls of anyone in the collections department. Miller later testified, "Of course, it was pretty much a given because she did leave early that day that she would have the fewest [calls], but I just wanted to make sure that she was aware that I was watching or looking at that report every day." McAlister

¹The Board of Review, appeal tribunal, and special examiners shall not be bound by common law or statutory rules of evidence or by technical rules of procedure, but any hearing or appeal before the tribunals shall be conducted in such manner as to ascertain the substantial rights of the parties. Ark. Code Ann. § 11-10-526(a)(1) (Repl. 2002). McAlister indicated at the outset of the hearing that, in support of her appeal, she was relying on four letters from other female employees of Car-Mart who claimed to have endured discrimination by Miller. The hearing officer initially indicated that he would consider the letters but later refused to hear McAlister's testimony in that regard. We simply note that, upon remand, the Board may consider whether McAlister had a reasonable opportunity to present this evidence.

explained that two meetings that morning had lasted until the lunch break and that she made thirty-three calls before she had to leave work because of the emergency involving her son. McAlister later testified that the three men in the collections department had complained that they were unable to make all of their calls due to the length of that morning's meetings.

After her meeting with Miller, McAlister went to the collections department to find that she was the only person who had come to work. Clay Conn, McAlister's witness, testified that he had called in sick that day and that the other two men in the collections department did not come to work because of the road conditions.

McAlister testified that Miller treated the women at Car-Mart differently from the men; that Miller used a different tone with the women; and that Miller asked the women to do things that he did not ask of the men. McAlister testified about an incident where Miller humiliated her in front of a customer by snatching a piece of paper out of her hand and asking her what she thought she was doing. McAlister said Miller would never have done that to a male employee.

Conn testified that, "[Miller is] very discriminative toward women." Conn was pressed by the hearing officer as to why Conn believed that Miller discriminated against women, and Conn testified, "Well, he has actually hired, after he got rid of the women, he had hired guys, just guys. When he got rid of the office assistant manager, he put a guy in there."

Conn further testified that he was present when Miller told a female employee to do push-ups in front of other employees and a customer. Miller instructed the woman not to do "sissy" or "girly" push-ups; rather, she was told to do "manly" push-ups. Conn testified that,

when it became clear that the woman could not do the “manly” push-ups as ordered, Miller told her to “go ahead and do the ‘girly’ push-ups, get on the knees and then do the girl push-ups like that.”

With respect to the Family and Medical Leave Act (FMLA), McAlister claimed that Miller had told her and another female employee that if they got FMLA, they would not have a job. Miller denied this. On the contrary, Miller testified that he had encouraged McAlister to apply for FMLA because he “wanted to be sure that [McAlister and the other female employee] were covered with that.” It was undisputed that McAlister’s son and husband suffered from health problems. Conn testified that Miller told McAlister in front of other employees at a staff meeting that, despite any medical issues with her husband and son, McAlister had to come to work.

Before quitting her job at Car-Mart, McAlister testified that she went to her operations manager once to complain about Miller and that Miller retaliated by “picking on her” even more. McAlister further testified that, while there was a toll-free company number to report complaints, as well as an “open-door policy,” Miller had told the employees at a staff meeting, at which Conn was present, that “it didn’t matter who we talked to or what we did, if we use an open-door policy or not, that [the owners] weren’t going to get rid of him and that they would get rid of us first.”

In this court’s review, we do not pass on the credibility of the witnesses, as that is a matter that is left to the Board of Review. *Bergman v. Dir.*, 2010 Ark. App. 729, ___ S.W.3d ___. The Board made no findings with respect to McAlister’s claim of gender discrimination.

When an administrative agency fails to make a finding on a pertinent issue, we do not decide the question in the first instance, but instead remand for a ruling. *Bergman v. Dir.*, 2009 Ark. App. 724. We direct the Board of Review to address and issue a ruling on McAlister's claim of gender discrimination in its determination of whether good cause existed for McAlister to leave her job.

Remanded for further findings.

ROBBINS and HOOFFMAN, JJ., agree.