Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-313

MAY TERM, 2021

Jennifer Brown* v. Department of Labor (Mactaw Inc., dba Pete's RV Center)	}	APPEALED FROM:
	}	Employment Security Board
	}	DOCKET NO. 05-20-014-01

In the above-entitled cause, the Clerk will enter:

Claimant appeals the Vermont Employment Security Board's decision to disqualify her from obtaining unemployment compensation benefits for a specified period based on its determination that she left her job voluntarily without good cause attributable to her employer. We reverse and remand the matter for further findings on the cause and reasonableness of claimant's decision to quit.

Claimant began working for her employer, Pete's RV Center, in February 2019 as an administrative assistant. In June 2019, she was promoted to the position of payroll specialist and given a raise. On January 7, 2020, claimant informed her employer that she was quitting, effective immediately.

Claimant applied for unemployment compensation benefits on March 22, 2020. The claim adjudicator's April 29, 2020 fact-finding form indicated that claimant explained she quit because "[t]hey weren't treating [her] very fairly" and she "didn't feel appreciated." According to claimant, the final incident causing her to leave was that she had to work during a December 2019 holiday party because of a payroll issue and that the people at the party turned off the lights when they left, forgetting that she was still in the building. She indicated that her boss barely spoke to her and never gave her credit for all the extra work she did. She also indicated she felt that the job was not a place where she was going to grow. In response to a question asking if she had tried to talk to anyone, she indicated that her supervisor was not on her side and did not seem to have any advice on how she could be taken more seriously. The claims adjudicator determined that claimant was not eligible for benefits because she left her job voluntarily without good cause attributable to her employer. See 21 V.S.A. § 1344(a)(2)(A).

On May 6, 2020, now represented by counsel, claimant appealed the claims adjudicator's decision. An administrative law judge (ALJ) held a telephonic hearing on June 5, 2020, during which claimant alleged, among other things, that one of the part-owners of the business made "dumb blonde" jokes, belittled the type of degree she had, and made offensive comments suggesting that a co-worker had a doctor's appointment to treat a sexually transmitted disease and that claimant would "know all about that." At the hearing, the part-owner denied making any of the alleged comments, and claimant's supervisor denied hearing any of the comments.

Following the hearing, the ALJ upheld the claims adjudicator's determination that claimant left her job voluntarily without good cause attributable to her employer. The ALJ concluded that claimant quit because she did not believe that her employer appreciated her or valued her, but that that was not a reasonable basis for her to choose unemployment over continued employment. Regarding the offensive comments allegedly made by the part-owner, the ALJ noted that claimant never complained to her employer or any government agency about those comments or any other incidents that made her feel disrespected. The ALJ rejected claimant's argument that the offensive comments, which were allegedly made during the summer of 2019, constituted unlawful sexual harassment. The ALJ concluded that even assuming the part-owner made the comments, they did not amount to the type of severe or pervasive conduct that would be considered unlawful sexual harassment under Title VII of the federal Civil Rights Act of 1964 or the Vermont Fair Employment Practices Act.

Claimant appealed to the Board, which considered the arguments of the parties' attorneys but took no additional evidence at a September 15, 2020 hearing. Following the hearing, the Board issued a 2-1 decision adopting the ALJ's findings and conclusions and sustaining her decision. The dissenting Board member believed that claimant presented credible testimony sufficient to establish a hostile work environment and to demonstrate that she did not feel she could complain to anyone because the offensive comments were made by a part-owner. The dissenting member also stated that she was troubled by an employer exhibit suggesting that claimant had signed off on a 2019 version of the employee handbook rather than the 2011 version that claimant had actually signed off on.

On appeal, claimant argues that the Board abused its discretion by: (1) not specifying how it reached its conclusion that she did not meet the threshold for demonstrating an involuntary quit; (2) not addressing her claim that her employer committed a fraud upon the court by submitting an exhibit suggesting that claimant signed off on a version of the employee handbook that she had not signed off on; and (3) not concluding that she left her job for good cause based on a hostile work environment as the result of sexual harassment.

We find no merit to claimant's first two arguments. Regarding her first argument, the Board acted within its authority by adopting the ALJ's findings and conclusions after reviewing the record. On appeal from the ALJ, the Board "may affirm, modify, or reverse the decision of the [appeals] referee" and "shall make its findings of fact and conclusions thereon." 21 V.S.A. § 1349; see also Employment Security Board Rule 15D, Code of Vt. Rules 24 005 001, http://www.lexisnexis.com/hottopics/codeofvtrules. Nothing in the statute or Board rules, however, precludes the Board from adopting as its own the findings and conclusions of the ALJ.

Regarding her second argument, claimant asserted in the proceeding before the ALJ that an exhibit submitted by her employer contained a fabricated signature page intended to show that she had signed off on receiving a copy of the 2019 revised employee handbook, when in fact she had not. Claimant argues on appeal that the issue was never resolved in the proceedings below and that the employer's filing of the exhibit amounted to fraud upon the court. The issue concerning the challenged exhibit was thoroughly vetted, however, at the ALJ hearing, wherein it was revealed that: (1) when claimant was hired in February 2019, she signed off on having received and read the terms of a 2011 employee handbook; (2) she did not sign off on having received and read the 2019 revised employee handbook, but she was aware of the existence of a 2019 updated version of the handbook and where a physical copy of the revised handbook was located; and (3) both versions of the handbook contained a sexual harassment policy, which remained unchanged in the 2019 version, except that the later version added the name of the employer's attorney as a person to whom employees could go to register a complaint. On appeal,

claimant makes no attempt to explain what difference it made in this case that she did not formally sign off on having received and read the 2019 version of the employee handbook. Accordingly, this argument does not establish a basis to overturn the Board's decision.

At the heart of this appeal is claimant's contention that the Board abused its discretion by not finding that she left her job for good cause attributable to her employer—namely, because of a hostile work environment due to sexual harassment. "[W]hether a resignation is for good cause attributable to the employer is a matter within the special expertise of the Employment Security Board, and its decision is entitled to great weight on appeal." Allen v. Dep't of Emp't Sec., 141 Vt. 132, 134 (1982); accord St. Martin v. Dep't of Labor, 2012 VT 8, ¶ 6, 191 Vt. 577 (mem.). We will affirm the Board's determination so long as the findings are supported by credible evidence and, in turn, support the Board's conclusions. St. Martin, 2012 VT 8, ¶ 6. We will not uphold the Board's decision, however, if its findings do not support its determination regarding whether the claimant's voluntary quit was justified by good cause attributable to the employer. Allen v. Dep't of Emp't & Training, 159 Vt. 286, 289 (1992).

"In a voluntary termination case such as this one, the claimant has the burden of showing two things: (1) a sufficient reason to justify the quit; and (2) that the reason for the voluntary separation was attributable to the employer." St. Martin, 2012 VT 8, ¶ 7. Whether there was good cause to justify the quit is determined by a reasonableness standard that considers "what a reasonable person would have done in the same circumstances." Id. (quotation omitted). "There is no bright-line threshold in our law defining an intolerable working environment such that good cause to quit exists as a matter of law." Bombard v. Dep't of Labor, 2010 VT 100, ¶ 7, 189 Vt. 528 (mem.). "Rather, we analyze each situation individually." Id.

"Generally, notice to the employer is required when an employee leaves a job for unsatisfactory working conditions so that the employer has an opportunity to rectify the situation before becoming responsible for unemployment compensation payments." Id. ¶ 9 (quotation omitted). Moreover, "anticipation of a poor outcome is not a substitute for providing the employer with notice of the basis for the employee's concerns." Id. ¶ 10 ("Before terminating employment unilaterally, an employee must make some effort to remedy alleged poor working conditions or demonstrate that such effort would be unavailing."). Required notice to the employer is "problematic," however, in the context of sexual harassment claims because victims "may not complain of sexual harassment in the workplace out of fear of not being believed, embarrassment about making it known, and fear of reprisals." Allen, 159 Vt. at 290; see also Bombard, 2010 VT 100, ¶ 12 (citing Allen for proposition that lack of notice to employer does not automatically preclude awarding unemployment benefits for "victims of confirmed unwanted and serial sexual overtures in the workplace"). Thus, "a claimant who fails to report sexual harassment before quitting [a] job or giving the employe[r] an opportunity to remedy the harassment is not automatically precluded from receiving benefits." Allen, 159 Vt. at 292. In Allen, we concluded that notice to the employer was not required because the evidence showed "that the harassing supervisor was in a position of sufficient authority to hire and fire [the claimant] and there was no effective policy at the [place of employment] to deal with sexual harassment under those circumstances." Id. at 292-93 (noting that claimant testified she neither received nor knew of procedure for instituting sexual harassment complaints and that employer offered no testimony to rebut claimant's testimony).

In this case, unlike Allen, the undisputed evidence, including claimant's testimony, confirmed that the employer had a written sexual harassment policy of which claimant was aware. However, neither the ALJ nor the Board made any findings on whether claimant was justified in failing to report the alleged harassment, considering claimant's testimony that she believed

complaining would have been futile because she would have had to complain to the person who harassed her or others who witnessed the harassment. The ALJ briefly mentioned the alleged offensive comments, noting that claimant had never brought them to her employer's attention and concluding that even if they were made, "they simply did not rise to the level of unlawful sexual harassment, which involves severe or pervasive conduct, under the federal Title VII of the Civil Rights Act of 1964 or the Vermont Fair Employment Practices Act."

The issue in this unemployment compensation case is whether the alleged comments were made and, if so, whether they provided a reasonable basis for claimant to quit, given the specific circumstances of this case—not whether the employer violated the above acts. Neither the ALJ nor the Board squarely addressed these questions.

There is also the issue of proximate cause. The ALJ's questioning revealed that the alleged comments occurred in the summer of 2019—several months before claimant quit. The ALJ's findings focused primarily on the holiday party incident, which occurred shortly before claimant quit. The ALJ concluded that "claimant quit because she did not believe the employer appreciated or valued her," which was consistent with claimant's initial statement as to why she quit. Although the ALJ's conclusions could conceivably be construed as determining that claimant quit solely because she did not feel appreciated, which reached a breaking point as the result of the holiday party incident, the ALJ's conclusions overall are not clear on that point. Cf. Demar v. Dep't of Labor, 2010 VT 69, ¶ 6, 188 Vt. 577 (mem.) (upholding Board's conclusion that proximate cause of claimant's decision to quit was exchange of text messages days before she quit rather than pay reduction that occurred two months earlier). Accordingly, we remand the matter for further findings on the cause and reasonableness of claimant's decision to quit without notifying her employer of the alleged harassment.

Reversed and remanded.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice