No. 11-AA-350

DISTRICT OF COLUMBIA COURT OF APPEALS

CONSUMER ACTION NETWORK

Petitioner,

v.

FRANCES TIELMAN

Respondent.

On Petition for Review from
the Office of Administrative Hearings

BRIEF OF RESPONDENT

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STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties in this case are the former employer Consumer Action Network, the Petitioner, and Frances Tielman, its former employee, the Respondent. CAN was represented in the Office of Administrative Hearings by Thomas B. Martin of the Employer Advocacy Program and in this Court by Connie N. Bertram of Cooley LLP. Ms. Tielman was represented in the OAH by Tonya Love of the Claimant Advocacy Program, Metropolitan Washington Council, AFL-CIO. Ms. Tielman is represented in this Court by John C. Keeney, Jr. of the Legal Aid Society of the District of Columbia. No intervenors or amici have appeared.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

REGULATIONS

STATUTES

*Authorities principally relied on.

QUESTION PRESENTED

In this unemployment benefits determination, whether substantial evidence supports the administrative law judge's finding that Ms. Tielman had good cause for her voluntary resignation as Director of Training at Consumer Action Network ("CAN") five days after CAN reduced her full-time position to 30 hours per week and reduced the employer contribution of health insurance premiums from 100 percent to 50 percent, and Ms. Tielman determined that she could not live on that reduced compensation.

STATEMENT OF THE CASE

This case arises out of a decision by an Administrative Law Judge (ALJ) at the D.C. Office of Administrative Hearings (OAH), awarding unemployment benefits to Respondent Frances Tielman because the ALJ found that she had established good cause for resigning voluntarily from her job. Ms. Tielman left her job with CAN in October 2010, after the employer announced that it was reducing her hours – and thus her pay – by 25 percent, and increasing her health insurance premium. Ms. Tielman sought unemployment compensation from the Department of Employment Services (DOES), which denied her claim. She then sought review at OAH, which reversed the DOES decision and awarded her benefits. CAN now appeals that determination.

STATEMENT OF FACTS

Ms. Tielman, a single mother supporting two children, began working as Director of Training at CAN on December 1, 2008. App. 44, Tr. l.4-7.[1] This was a full-time position that

[1] "App." refers to the appendix filed by Petitioner, "Ex." refers to an exhibit in the record below, "Tr." refers to the hearing transcript; and "l." to the lines in the transcript. Respondent notes the error on the cover page of petitioner's brief in listing counsel for Ms. Tielman also. So

involved working with mental health advocates and preparing data and reports for CAN's primary funder, the District of Columbia Department of Mental Health (DMH). App. 45-46, Tr. l.45:10-16, l.46:10-13.

In October 2010, the District significantly reduced CAN's funding. App. 31, Tr. l.3-4. On October 11, 2010, Brenda Smith, Director of Personnel and Finance at CAN, sent a memorandum to all employees detailing the budget reductions and CAN's planned response. App. 112. In particular, the organization announced "two significant changes that will affect every employee as follows:

- "Effective immediately all full time employee hours are reduced from forty hours per week to 30 hours per week. …
- "Health insurance will no longer be paid at 100% by CAN. Under the new contract health insurance will be paid at 50% and employees will be responsible for 50% which will be a deduction from the payroll."

Id.

The following day, CAN leadership held a meeting to discuss the cuts. App. 54, Tr. l.23-24. At that meeting, Ms. Tielman learned that in addition to the changes in her compensation, CAN was restructuring the workday, replacing a 30-minute paid lunch period with an hour of unpaid lunch. Ms. Tielman explained that the new schedule would "make[] it impossible for me to even work a part time job because I technically still have to be downtown in proximity of the office . . . if I have to take an hour unpaid lunch." App. 56, Tr. l.19-24. She informed her CAN superior that, as a result of this combination of circumstances, "I didn't know how I was going to do it. . . . I didn't know how I was going to make ends meet." App. 55, Tr. l.21-24. She further

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the record is clear, counsel for Ms. Tielman consented to the contents of the appendix, not the contents of the CAN brief.

explained that "I'm a single mother with two kids and this presents a great hardship on me." App. at 55-56, Tr. l.25-p.56 l.1.

Five days later, on October 17, 2010, Ms. Tielman submitted her letter of resignation. App. 106. The letter focused on the changes to her compensation: "My work hours were reduced to 30 hours from a 40-hour work week resulting in a severe cut in pay of 25%. There was also a 50% change in my health insurance premium costs effective October 26, 2010 for $346 per month." *Id*. The resignation letter mentioned other changes due to the economic cutbacks, including the elimination of the paid half hour for lunch and reductions in the amount of her paid leave. *Id.* at 106-107.

Ms. Tielman then applied for unemployment compensation. On November 30, 2010, the DOES claims examiner denied her claim, on the ground that she had failed to show good cause for her voluntary resignation. App. 100. Ms. Tielman timely appealed. App. 103.

The parties appeared for a hearing before OAH on January 14, 2011. At that hearing, Ms. Tielman testified that, as she had stated to her CAN superiors in October, the changes in her compensation had made it impossible for her to continue supporting herself. Ms. Tielman testified that there were "several reasons" for her resignation, and that "one was the reduction in hours, approximately 25% drop in pay. Uh, there was a large increase to my health insurance benefits. It went to $346, which created a hardship along with the, you know, reduction in pay." App. 49-50, Tr. l.24-25 at page 49 through l.1-3 at page 50.

Ms. Tielman also testified as to her other frustrations with the job, including reductions in her responsibilities and changes in her role that predated the cut in her compensation. App. 57, Tr. l.15; App. 59, l.22. When the ALJ inquired why she did not resign earlier, given these concerns, Ms. Tielman responded: "[F]irst of all, I have a family to support. I have financial

obligations." App. 58, Tr. l.4-9. Accordingly, for some period of time, she decided to "stick with it." App. 58, Tr. l.12. But the reduction in hours and increase in her health insurance costs, together with the "negative atmosphere" in the office, was "the last straw." App. 58, Tr. l.16-19.

On February 17, 2011, the ALJ issued a Final Order, reversing the Claims Examiner and awarding benefits to Ms. Tielman. The ALJ's findings of fact included the following:

> 3. At the beginning of October 2010, Employer began operating under a new contract with the District of Columbia. The new contract provided less remuneration for Employer's services than the previous contract. On October 12, 2010, Employer held a staff meeting at which it announced that because of the new contract the total number of hours per week worked by all employees including Claimant, would be reduced from 40 to 30. In addition, employees would be responsible for paying 50% of their health insurance premiums instead of 0%. Exhibit 100. For Claimant, this amounted to a 25% reduction in salary and an additional $346 per month for health insurance premiums. *Id*. The changes were to take place immediately.
>
> 4. Given her reduced compensation and the increase in health insurance cost, Claimant determined that she could not afford to live on his [sic] current wages and that [s]he must resign. Claimant resigned effective October 17, 2010. *Id*.

App. at 122, Opinion at 3.

Although the Opinion noted that Ms. Tielman had experienced difficulties at CAN prior to the reduction in compensation, it specifically concluded that she had resigned due to the changes to her pay and insurance benefits and not these other factors. The ALJ noted that Ms. Tielman "alluded to other frustrations with her job . . . which led her to seek treatment from a mental health therapist. However, these incidents occurred well before she resigned, and I find that the reduction in hours Employer announced on October 12, 2010 was the factor which led to Claimant's resignation." App. 124, Opinion at 5 n.2.

Based on these facts, the ALJ found that "the reduced hours and the corresponding reduction in wages, combined with the additional burden of $346 for health insurance premiums,

was a substantial reduction in wages and constituted good cause connected with the work for Claimant to voluntarily quit her work." App. 125, Opinion at 6. Accordingly, the ALJ found that Ms. Tielman had met her burden of proof and determined that she was entitled to unemployment benefits.

STANDARD OF REVIEW

CAN's appeal challenges the ALJ's finding that Ms. Tielman had "good cause connected with the work" for resigning from her position with the organization. That question is subject to substantial evidence review. This is so because "[t]he determination of 'good cause connected with the work' is factual in nature and turns on what 'a reasonable and prudent person in the labor market' would do under similar circumstances." *Cruz v. D.C. Dep't of Employment Servs*., 633 A.2d 66, 70 (D.C. 1993); *see Kramer v. D.C. Dep't of Employment Servs.*, 447 A.2d 28, 30 (D.C. 1982) (same). Because a fact-based inquiry is the province of OAH, this Court defers to the agency's findings, reversing only where the decision is not supported by substantial evidence. *See Berkley v. D.C. Transit, Inc.*, 950 A.2d 749, 762 (D.C. 2008) (applying substantial evidence standard to good-cause determination); *Lyons v. D. C. Dep't of Employment Servs.*, 551 A.2d 1345, 1346 (D.C. 1988) (same).

Contrary to CAN's portrayal, there is no portion of the ALJ's decision that warrants *de novo* review. Pet. Br. at 9. The decision does not make, much less turn on, any errors of law. Instead, it makes two entirely factual determinations: That Ms. Tielman resigned from CAN because she could not afford to live on her newly reduced compensation, and that she had "good cause connected with the work" for doing so. Both of these findings are supported by substantial evidence, *i.e.*, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Ferreira v. D.C. Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995)

(citations omitted). This Court "will affirm the agency's findings of fact . . . as long as they are supported by substantial evidence notwithstanding that there may be contrary evidence in the record (as there usually is)." *Id.*

SUMMARY OF ARGUMENT

Substantial evidence supports the ALJ's factual finding that Ms. Tielman resigned from her job because the reduced hours and the corresponding reduction in wages, combined with the increase in her health insurance premiums, made it too difficult to make ends meet. The employer's argument that Ms. Tielman resigned for an entirely different factual reason, "general dissatisfaction with work," was addressed directly and rejected by the ALJ, and there is no basis for disturbing that finding on appeal.

The ALJ correctly found that the changes that reduced her compensation not only were the reason Ms. Tielman resigned, but were good cause for her to do so. Substantial evidence and this Court's precedents support the ALJ's conclusion that Ms. Tielman's actions were those of "a reasonable and prudent person in the labor market" in "the same circumstances." Contrary to CAN's contention, Ms. Tielman was neither obligated nor able to find a second job or to look for another position prior to resigning. The question of "good cause" looks to the employee's situation at her current job, not her prospects for obtaining another one.

There were no errors of law. There was "no *per se*" rule by the ALJ about a 25 percent reduction in wages, as argued by CAN. Instead, the ALJ, after analyzing all the circumstances, concluded that the 25 percent reduction in wages, combined with the increase in health insurance premiums, constituted good cause in this case. Nor did the ALJ count health insurance premiums as "wages." The opinion always separated wages and premiums and referred to "the

additional burden of $346 per month for health insurance premiums" in connection with its conclusion of "good cause."

The employer's reasons for the cutbacks are irrelevant. The unemployment compensation program is a remedial humanitarian program designed to protect employees, not employers, from financial hardship and to that end is liberally and broadly construed. The final order is amply supported by substantial evidence and should be affirmed.

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE FACTUAL FINDING THAT MS. TIELMAN RESIGNED DUE TO A REDUCTION IN HOURS, A 25 PERCENT REDUCTION IN WAGES, AND AN ADDITIONAL $346 PER MONTH FOR HEALTH INSURANCE PREMIUMS.

The critical finding at issue here is the ALJ's conclusion that "[g]iven her reduced compensation and the increase in health insurance costs, Claimant determined that she could not afford to live on his [sic] current wages and that [s]he must resign." App. 122, Opinion at 3. CAN takes issue with this purely factual determination, contending that the ALJ "ignored" evidence suggesting that Ms. Tielman resigned "due to her general dissatisfaction with work" and not because of the changes in her compensation. Pet. Br. at 1, 10.

The employer's attempt to re-frame the record in this case is not persuasive. CAN does not dispute, and the ALJ found, that in October of 2010, the organization announced significant changes in employee compensation and benefits that were to take place immediately. As the ALJ found:

> At the beginning of October 2010, Employer began operating under a new contract with the District of Columbia. The new contract provided less remuneration for Employer's services than the previous contract. On October 12, 2010, Employer held a staff meeting at which it announced that because of the new contract the total number of hours per week worked by all employees, including Claimant, would be reduced from 40 to 30. In addition,

> employees would be responsible for paying 50% of their health insurance premiums instead of 0%. Exhibit 100. For Claimant, this amounted to a 25% reduction in salary and an additional $346 per month for health insurance premiums. *Id.* The changes were to take place immediately.

App. 122. This finding of fact represents the undisputed factual circumstances.

Ms. Tielman testified that as a result of these changes, "I didn't know how I was going to make ends meet." App. 55, Tr. l.23-24. The reduction in hours, which amounted to a pay cut of 25 percent, combined with the increase in her health insurance costs, left her facing "great hardship." App. 56, Tr. l.1. Accordingly, five days after being informed of the changes in her compensation, she submitted her letter of resignation. The letter emphasized those changes in explaining why she was leaving her job. App. 106-07.

These facts amply support the ALJ's conclusion that Ms. Tielman resigned because she could not support herself given the reduction in her wages and the increase in her health insurance costs. CAN disagrees, and contends that Ms. Tielman "quit due to her general dissatisfaction with work." Pet. Br. at 10. The ALJ, however, specifically considered Ms. Tielman's "general dissatisfaction" and determined that it was not what caused her to leave. App. 124, Opinion at 5 n.2. The ALJ noted that although Ms. Tielman had experienced "other frustrations" during her time with CAN, the compensation changes and not these other frustrations were "the factor which led to Claimant's resignation." *Id.* Substantial evidence supports this finding. The October 17, 2010 resignation was close in time to the October 12, 2010 cutbacks, and Ms. Tielman explicitly referenced those cutbacks in her resignation letter. App. 106. By contrast, the other frustrations, as the ALJ found, "occurred well before she resigned." App. 124, Opinion at 5 n.2.

While CAN may disagree with the ALJ's weighing of the evidence, that is not a basis for reversing the OAH decision. This Court's "review of the agency's findings is limited." *Cruz,*

633 A.2d at 70. As this Court stated in *Ferreira*, 667 A.2d at 312, "[this Court] will affirm the agency's findings of fact … as long as they are supported by substantial evidence notwithstanding that there may be contrary evidence in the record (as there usually is)." Indeed, even if the evidence that Ms. Tielman resigned for other reasons were more substantial than it is, "the mere existence of substantial evidence contrary to the [ALJ's] finding does not allow the [C]ourt to substitute [its] judgment for [the ALJ's judgment]." *Bublis*, 575 A.2d at 305 (citations omitted).

In this case, the record amply supports the ALJ's finding that the changes in her compensation, which left her financially unable to support her family, were "the factor[s]" that led to Ms. Tielman's resignation. Ms. Tielman so testified; her letter of resignation so stated; and the ALJ credited her testimony in this regard. CAN has offered no basis for disturbing the ALJ's findings on this critical fact.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ'S FINDING THAT THE CHANGES IN MS. TIELMAN'S COMPENSATION CONSTITUTED "GOOD CAUSE" FOR HER TO RESIGN.

CAN next contends that even if Ms. Tielman did resign because of changes in her compensation, those changes were not "good cause" for voluntarily terminating employment, either because the changes were not legally significant or because a "reasonable and prudent person" would have remained on the job despite the cutbacks. Pet. Br. at 12-18, 20-23. Neither argument is correct and neither warrants reversal.

Where an employee voluntarily leaves her position, she is entitled to unemployment compensation if she demonstrates "good cause connected with the work for the voluntary leaving." 7 D.C.M.R. § 311.4. The question of good cause "is factual in nature, and turns on what 'a reasonable and prudent person in the labor market' would do under similar

circumstances." *Cruz*, 633 A.2d at 70 citing *Kramer v. D. C. Dep't of Employment Servs*, 447 A.2d 28, 30 (D.C. 1982) (same). The ALJ's determination on the "good cause" question will be affirmed if it is supported by substantial evidence. *See Berkley*, 950 A.2d at 762; *Lyons*, 551 A.2d at 1346.

As discussed more fully below, the record in this case contains substantial evidence that the changes in Ms. Tielman's compensation constituted good cause for her resignation. First, a change of this nature is the type of "good cause connected with the work" that both the unemployment regulations and this Court have recognized as warranting a voluntary separation. Second, the ALJ correctly found that Ms. Tielman's actions were consistent with what a "reasonable and prudent person" in her position would have done. Finally, the ALJ's findings regarding the reduction in Ms. Tielman's wages did not create any "per se" rule regarding wage cuts, but instead, appropriately assessed the facts and circumstances in this case to conclude that the wage reduction here, in combination with the change in benefits, justified Ms. Tielman's decision to leave her job.

A. "Good cause" includes a reduction in compensation such that the employee can no longer support herself.

"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; there must be some compulsion produced by extraneous and necessitous or compelling circumstances." *Cruz*, 633 A.2d at 72 (citation omitted). The test, according to the unemployment regulations, is "what . . . a reasonable and prudent person in the labor market [would] do in the same circumstances." 7 D.C.M.R. § 311.5.

To aid in applying this test, the regulations set forth examples of factors that do and do not constitute good cause. 7 D.C.M.R. §§ 311.6, 311.7. Among the factors that do not pass

muster are items unrelated to the workplace, such as "marriage or divorce," "personal or domestic responsibilities," and "resignation in order to attend school or training." *Id.* § 311.6; *see Lyons*, 551 A.2d at 1346-47 (holding that the desire to relocate with a spouse was not good cause for leaving work); *Gomillion v. D.C. Dep't of Employment Servs.*, 447 A.2d 449, 451 (1982) (finding that the offer of a higher-paying job, absent any evidence of conditions at the current employment, did not demonstrate "good cause connected with the work"). Good cause also does not include reasonable or insignificant changes in job conditions, such as a transfer of position that is "reasonable" or a "minor reduction in wages." 7 D.C.M.R. § 311.6; *see Bowen v. D.C. Dep't of Employment Servs.*, 486 A.2d 694, 698 (D.C. 1985) (finding that the failure to receive a promotion or salary increase was not good cause for resigning).

On the other hand, good cause does include significant changes to working conditions or compensation. 7 D.C.M.R. § 311.7. Using that standard, this Court has recognized that a reduction in hours may constitute good cause for leaving work. *See Berkley*, 950 A.2d at 762. In *Berkley*, the employee's hours had been reduced from a full-time schedule to one of approximately four hours a day, with some days offering no hours at all. *Id.* Under these circumstances, the Court held, "[i]t is understandable that a reasonable person who experienced such a change in hours would seek other employment." An employee may also demonstrate good cause by showing serious concerns about the employer's financial stability and the likelihood of continued employment. *See Beynum v. Arch Training Center*, 998 A.2d 316, 319 (D.C. 2010); *Cruz*, 633 A.2d at 71-72.

Applying these principles to this case, the ALJ correctly found that Ms. Tielman had "good cause" to leave her employment with CAN. The circumstances that caused Ms. Tielman to resign were "real," "substantial," "reasonable," and compelled by changes in her

compensation that caused her great financial hardship. *Cruz*, 633 A.2d at 72. Ms. Tielman did not leave for "personal reasons" or to take advantage of another opportunity. Nor does CAN even attempt to claim that the reduction in her wages was "minor," or that the increase in her health premiums was insignificant.[2] Instead, the record makes clear, and the ALJ found, that Ms. Tielman left her job because the changes in her compensation made it impossible to "make ends meet" and to continue supporting her family. App. 122, 124, Opinion at 3, 5. The record also indicates that because of the restructuring of her working day, which now required an hour of unpaid lunch time, it would be impossible for Ms. Tielman to take a second part-time position or, presumably, to spend significant time looking for a better job. App. 56, Tr. l.17-24.

As in *Berkley*, it is "understandable that a reasonable person who experienced such a change in hours," and a corresponding reduction in salary and increase in benefits, would feel it necessary to leave the work in order to pursue better-paying opportunities. The ALJ so found in this case, based on the substantial evidence in this record, measured against the definition of "good cause" set forth in the regulations and construed by this Court.

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[2] Contrary to CAN's contention, the ALJ did not count health insurance premiums as "wages." Finding of Fact 4 makes clear that the two are separate: "[G]iven her reduced compensation *and* the increase in health insurance costs, Claimant determined that she could not afford to live on his [sic] current wages and that [s]he must resign." App. 122, Opinion at 3 (emphasis added). In its concluding paragraph, the Opinion again separated the reduction in wages from "the additional burden of $346 per month for health insurance premiums." App. 125, Opinion at 6. The ALJ properly evaluated that additional burden as part of the "good cause" inquiry into "the circumstances which constitute good cause connected with the work … based upon the facts in each case." 7 D.C.M.R. § 311.5. And the statutory definition of "wages," which forms the center of CAN's argument on this point, relates to the calculation of benefits and has nothing to do with what factors constitute "good cause" for leaving a job. Ironically, the ALJ performed exactly what CAN's brief complains was lacking: "a fact-specific inquiry that turns on the specific circumstances of each case." Pet. Br. at 13.

B. The record in this case supports the "reasonable and prudent person" finding necessary for a determination of good cause.

CAN attacks the ALJ's good-cause determination on the ground that no "reasonable and prudent person in the labor market" would have resigned from Ms. Tielman's job. Pet. Br. at 17. CAN argues that "under the facts and circumstances of this case, it was neither reasonable nor prudent for Tielman to voluntarily quit," but it omits any of the facts and circumstances found by the ALJ. Thus, CAN argues that "in failing to present evidence beyond the reduction in her wages, Tielman failed to meet her burden. Her claim for benefits should be denied." *Id.* However, Tielman presented substantial evidence "beyond the reduction in her wages." As the ALJ found, Ms. Tielman proved the increase in health insurance costs and also presented unrebutted testimony, corroborated by her written resignation letter, that these combined cutbacks made it impossible for her to support her family.

Nonetheless, CAN contends that Ms. Tielman did not act "reasonably and prudently" in leaving her job. In particular, CAN suggests that Ms. Tielman's actions were unreasonable because 1) she did not seek a part-time job; 2) she did not try to obtain another job before resigning; 3) the "Great Recession" should have deterred her from leaving even the meager employment she now had at CAN. None of these arguments withstands scrutiny.

1. CAN contends that Ms. Tielman cannot meet the "reasonable and prudent person" test because instead of resigning, she could have used her newly-acquired ten hours per week to secure another part-time job rather than resign and seek unemployment compensation. Pet. Br. at 20-21. That argument is both factually and legally incorrect. As a factual matter, Ms. Tielman testified that because of the way in which CAN had rearranged the workday – replacing a half-hour of paid lunch with an hour-long, unpaid lunch break – it would be impossible for her to obtain a part-time employment because she had to remain at or near the office for most of the

day. App. 56, Tr. l.17-24. CAN did not dispute her testimony on this point or present any evidence to the contrary.

Moreover, even if the evidence in this record did suggest that Ms. Tielman could have obtained part-time employment, that fact would be irrelevant to the good-cause determination in this case. Examining courses of action that would have been "more prudent" is "a patent misapplication of the 'reasonable and prudent person' test set forth in [the unemployment regulations]." *Bowen*, 486 A.2d at 698 n.5. "The issue is whether the claimant's actual course of conduct was reasonable and prudent, not whether some other course of conduct would have been more prudent." *Id.* The only question in this case is whether, given the reduction in her compensation to a point at which she could not support her family, Ms. Tielman acted reasonably in leaving her job. As discussed above, the ALJ correctly found that she did.

2. CAN also argues that Ms. Tielman should have attempted to find other employment before quitting. Pet. Br. at 20. That is not required for unemployment compensation. Even if it were, CAN's contention is unsupported by substantial evidence in this record, given that CAN introduced no evidence that she did not begin looking for other work between the announcement of cutbacks and her October 17 resignation letter. Nor, for the same reasons that precluded her from obtaining part-time employment, could Ms. Tielman have used her extra ten hours per week "to at least try to find other employment that would have paid . . . her previous wage." Pet. Br. at 21. Because of CAN's restructuring of the workday, the reduction in hours did not increase Ms. Tielman's free time in any meaningful way. She therefore was no better positioned to look for full-time work than she was to work a second job. App. 56, Tr. l.17-24.

For this reason, CAN's reliance on good-cause caselaw from Illinois and Missouri is misplaced. *See* Pet. Br. at 21-22 (citing *Division of Emp't Sec. v. Labor & Indus. Relations*

Comm'n, 625 S.W.2d 882 (Mo. Ct. App. 1981) and *Collier v. Illinois Dep't of Emp't Sec.*, 510 N.E.2d 623 (Ill. App. Ct. 1987)). In both cases, the court specifically noted that the claimant, as a result of a reduction in hours, had more time available to look for other work and therefore that leaving the current employment was not justified. *See Collier*, 510 N.E.2d at 624, 626; *Division of Emp't Sec.*, 625 S.W.2d at 885. Ms. Tielman did not have this opportunity available to her. Nor, even if she had, would CAN's argument necessarily prevail. While CAN relies on a few cases from outside this jurisdiction holding that a reduction in hours is not good cause for resigning, other state courts have gone the opposite way, ruling that a reduction in hours is good cause without reference to a claimant's ability to seek other work.[3]

More fundamentally, CAN's argument that Ms. Tielman should have tried to find another job before resigning turns the unemployment compensation scheme on its head. An individual is not eligible for unemployment benefits if he leaves his job for another one, because that individual *is employed* in the new position. The only individuals entitled to unemployment benefits are those who leave work without another position in place. For those individuals who leave voluntarily, the question is what caused them to leave, not what their prospects are or how hard they tried to find other employment. *See* 14 D.C.M.R. §§ 311.5 - 311.7.

Put another way, as this Court's line of unemployment caselaw makes clear, the "reasonable and prudent person" test looks to how a reasonable person would have reacted to the job at hand, not to the potential for finding or keeping another one. In fact, a number of these

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[3] *See, e.g., Grier v. Dep't of Employment Sec.*, 43 Wn. App. 92, 96-97 (Wash. Ct. App. 1986) (finding a 33 percent reduction in pay and requirement that claimant pay half her health insurance premium was an "unreasonable hardship," and thus claimant was eligible for unemployment compensation); *Ship Inn, Inc. v. Commonwealth Unemployment Comp. Bd. Of Review*, 412 A.2d 913, 915 (Pa. Commonw. Ct. 1980) (finding that a permanent reduction in pay by approximately 25% was "so substantial as to create a 'necessitous and compelling' cause for the claimant's voluntary termination" and additionally, that the claimant had not refused "suitable work" when given the choice between a 25% reduction in pay or voluntary quit).

cases concern an employee who voluntarily left a job in order to take another position, albeit one that failed to materialize. *See, e.g.*, *Beynum*, 998 A.2d at 317; *Berkley*, 950 A.2d at 755; *Cruz*, 633 A.2d at 68. None of these cases give any weight to the claimant's efforts, or lack thereof, to find and keep another job. Rather, the sole focus in each case has been on the conditions of the job left behind, not the employee's prospects upon leaving it. *See Beynum*, 998 A.2d at 319 (noting that the employee's "uncertainty regarding her future at Arch" was a "legally significant fact" in applying the "'reasonable person' test for "'good cause'"); *Berkley*, 950 A.2d at 762 ("It is understandable that a reasonable person who experienced such a change in hours would seek other employment."); *Cruz*, 633 A.2d at 71 (allegations of the employer's financial instability and actions of other staff members "merit scrutiny under the 'reasonable and prudent person'" test).

3. Finally, CAN's reliance on generalized employment statistics does not defeat Ms. Tielman's showing of good cause in this case. In essence, CAN argues that no prudent person would relinquish a job, no matter how much her compensation had been reduced, in times of high unemployment. Pet. Br. at 22-23.

With this argument, CAN attempts to carve out a new and wholly unworkable exception to the good-cause standard set forth in the unemployment law. Neither the statute nor the regulations make any reference to the broader employment conditions in determining good cause, and CAN cites no case in which this Court has ever taken that factor into account. That is unsurprising, because it is difficult to imagine how an ALJ would apply such a standard in individual cases. It is not clear, for example, how bad the job market would have to be in order to make a difference in a good-cause analysis. Nor is it clear how ALJs would measure that market – whether by national, regional, or District unemployment figures, and whether by

unemployment for all individuals, or only for those with experience, education, and skills similar to the claimant's. Nor does the sole case CAN cites for this proposition offer any guidance. *See Jones v. Dep't of Labor*, 140 Ill. App. 3d 699 (Ill. App. Ct. 1986). Indeed, that case considered an entirely unrelated question: whether a claimant who took a substantially lower-paying job, and then left it, could collect unemployment because the most recent job was "unsuitable." The court held that it was not, because it was similar to the previous job in all but wages and the claimant had no prospect of obtaining anything better. *Id.* at 702. The question here, however, does not involve comparing two jobs against one another, nor does it concern Ms. Tielman's chances of finding other employment. Nor is there any evidence in the record on that issue.

Aggregate unemployment statistics are not relevant to what a reasonable and prudent person would do given a particular occupation, skills and employment prospects. CAN's assertion that no reasonable and prudent employee would resign in this labor market is mere argument of counsel, and it is insufficient to refute the specific good cause shown by Ms. Tielman, and found by the ALJ, based on the record in this case.

Moreover, the effect of CAN's proposed exemption from unemployment benefits during economic downturns would be to weaken the unemployment compensation safety net just when it is most needed (and, in addition, to allow employers to coerce employees to accept unilateral cuts in hours, pay, and benefits for fear that there is no alternative). This is not the law in the District. Indeed, during the very 2010 economic downturn that caused the cutbacks to Ms. Tielman's hours, wages and benefits, the District of Columbia Council was explicit in amending the unemployment statute that "[u]nemployment insurance is a critical part of the safety net during these economic times even more considering that the District's unemployment rate has

topped 12%." D.C. Council Comm. on Hous. and Workforce Develop., *Report on Bill 18-455 "The Unemployment Compensation Reform Amendment Act of 2010"* (April 14, 2010) at 1.

The employer's *ipse dixit* argument on appeal that Ms. Tielman's resignation is not "what a reasonable and prudent person in the labor market [would] do in the same circumstances" is not supported by any evidence in the record, nor by any refutation of the financial hardship on Ms. Tielman resulting from the changes to her compensation. It is insufficient to overcome Ms. Tielman's showing of good cause.

C. The ALJ appropriately considered the 25 percent reduction in Ms. Tielman's wages in the context of other changes in her compensation and their aggregate impact on her financial circumstances.

Separate from attacking the good-cause finding on its merits, CAN argues that the ALJ committed legal error by finding that Ms. Tielman's 25 percent reduction in wages was *per se* "good cause" under the unemployment regulations. Pet. Br. at 12, 14. Contrary to CAN's contention, however, the ALJ never mentioned and never applied a *per se* test for "good cause" or anything else. The ALJ did not find, as a matter of law, that a substantial reduction in wages necessarily constitutes good cause in every situation. Instead, the ALJ made detailed factual findings that the 25 percent reduction in wages, "combined with the additional burden of $346 per month for health insurance premiums" (App. 125, Opinion at 6), meant that Ms. Tielman "determined that she could not afford to live" on the new compensation and therefore must resign. App. 122, Opinion at 3. Far from a *per se* test, the ALJ correctly considered, as is required by 7 DCMR § 311.5, all "the circumstances" and all "the facts in each case."

Because there was nothing *per se* in the ALJ's analysis, CAN's lengthy attack on *per se* rulings is simply beside the point. The ALJ's analysis of the question of reduction in wages was not, as CAN contends, an attempt to justify a per se rule about "substantial" wage reductions.

Instead, the opinion reflects the opposite: an investigation of what wage reductions are "minor" such that they *cannot* constitute good cause under the D.C. unemployment regulations. *See* 7 DCMR § 311.6(b) (excluding "minor reductions in wages" from factors constituting "good cause").[4] In considering the issue, which this Court has not yet addressed, the ALJ reasonably concluded that the reduction was not "minor" in the factual circumstances of this case because Ms Tielman "determined that she could not afford to live on [the] current wages." App. 122, Opinion at 3. Such a finding was particularly appropriate because, as this Court has emphasized, "the sufficiency of a claimant's asserted justifications must be considered in light of the remedial purposes of the statute." *Cruz*, 633 A.2d at 71. Here, the established financial hardship on a single mother with two children is a particularly compelling justification to seek employment elsewhere.

CAN's misreading of the ALJ's opinion also renders largely irrelevant its discussion of the cases cited in that decision. Pet. Br. at 14-17. CAN's discussion of these cases emphasizes that there is no *per se* rule based solely on wages, but of course the ALJ applied no such *per se* rule in finding good cause in this case. And even the Ohio and New York cases on which CAN relies only underscore the principle that "good cause" is a fact-specific determination to be made with reference to the specific circumstances of the case. In the *Stapleton* case, for example, the court held that while a 66 percent reduction in hours might constitute good cause if it were the only fact at issue, the record contained other factors weighing against the employee, including that the employee was "significantly, if not primarily, responsible for the situation that led to her reduced hours"; and that the reduction in hours was likely to be "only temporary," covering a two- to three-week period. *Stapleton v. Ohio Dep't of Job & Family Servs.*, 163 Ohio App.3d 14,

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[4] CAN mentions in passing the District's exclusion in 7 DCMR § 311.6(b), but does not attempt to argue that this exclusion applies to Ms. Tielman. Pet. Br. at 12.

22-23 (Ohio Ct. App. 2005). Taking all these facts together, the court found that the employee did not have "just cause" for leaving work. *Id.* at 23. Similarly, in *Ebiske,* the court found that the employee lacked good cause because she had resigned not only due to a reduction in hours, but because of "friction with her supervisor." *Matter of Ebiske*, 306 A.D.2d 777, 777 (N.Y. App. Div. 2003). The court did not address, much less decide, whether a 25 percent reduction in hours alone could constitute good cause for leaving work.

The ALJ in this case did not find that a 25 percent reduction in wages was *per se* good cause under the District's unemployment regulations. She did find that, in this case, taking all the circumstances into account, the changes in Ms. Tielman's compensation created good cause for her to leave her employment with CAN. That finding is supported by substantial evidence and should be affirmed.

III. CAN'S MISSION AND BUDGET CONSTRAINTS ARE IRRELEVANT.

CAN contends that because the reduction in wages and benefits were part of a "collective sacrifice in the interest of the organization's survival," it was not reasonable for Ms. Tielman to leave her job. Pet. Br. at 23. But the employer's reasons for changing Ms. Tielman's compensation, however understandable, have no bearing on whether she had good cause for resigning. Nor is the organization's laudable nonprofit mission relevant to its duty to pay unemployment benefits. As discussed below, the unemployment compensation scheme looks to the impact on the employee of employment decisions, not to the employer's financial or other considerations.

A. The ALJ was not required to consider CAN's reasons for making cutbacks.

CAN argues that its reduction in hours and increase in insurance costs did not constitute "good cause" because they were a necessary financial consequence of the city's cut in funding to

the organization. Pet. Br. at 18. But under the District's unemployment law, an employer's financial circumstances do not negate its employees' statutory entitlement to unemployment compensation. The "reasonable and prudent person" standard set forth in the regulations requires an objective consideration of the working conditions that motivated the individual's voluntary resignation. That standard does not change because of the employer's financial condition; the sole focus is the impact on the employee.

This Court has never recognized an exception to the "good cause" standard for employers in financial difficulty. Indeed, its precedents compel the opposite conclusion. In *Cruz*, this Court remanded to the ALJ for findings as to whether a claimant's economic anxiety about potential cutbacks was "good cause connected with the work" sufficient to justify benefits. *See* 633 A.2d at 66. The Court noted that Mr. Cruz, *inter alia*, "alleged that UPO was in a financial crisis, that employees had been furloughed, that he believed that his position was at risk, and, implicitly, that he would soon be out of work if he did not secure another job." *Id.* at 71. The Court did not even suggest that the employer's financial difficulty justified denying unemployment benefits. To the contrary, UPO's "financial crisis" was potential "good cause connected with the work" for the employee to resign. *Id.*; *see also Beynum*, 998 A.2d at 319 (noting that an employee who left because the employer did not have work for her may, "taking into account all the relevant circumstances, . . . have satisfied the "reasonable person' test for 'good cause.'"). The remands in these cases strongly suggest that employer financial difficulty is, if anything, a factor that supports rather than undermines an employee's claim of "good cause" for resigning.

In inviting the Court to create a new, employer-based exception to the unemployment benefits scheme, CAN relies on several intermediate appellate holdings from other states – none

of which has ever been cited with approval by this Court and none of which reflect the law in the District of Columbia. Pet. Br. at 18-20. Its heavy reliance on the Indiana intermediate appellate decision in *Best Chairs Inc. v. Review Bd. of Indiana Dep't of Workforce Dev.*, 895 N.E. 2d 727 (Ind. Ct. App.2008), is particularly misplaced. That case applied a wholly different standard, unique to Indiana, that an employee has good cause to resign and is entitled to unemployment benefits only where "the circumstances [are] so unfair or unjust as to compel a reasonably prudent person to quit work." 895 N.E.2d at 732. The Indiana "unfair or unjust" test is not the law here.[5] Such a test is inconsistent with numerous precedents of this Court including, *inter alia, Cruz* and *Jones*, *supra* (both holding that the statutory purpose is to "protect employees against economic dependency").

Nor do the other cases CAN cites support its attempt to carve out an exemption to the unemployment law for employers facing financial pressure. Neither *White v. Levine* nor *Hedrick v. Employment Division* turns on the employer's financial condition, nor does either consider evidence of the type in this record: the devastating impact on the employee of the changes in her compensation. *See White v. Levine*, 52 A.D.2d 1003 (N.Y. App. Div. 1976); *Hedrick v. Employment Division*, 548 P.2d 527 (Or. Ct. App. 1976).

Whatever is done in intermediate appellate courts in other states under different statutes, the intent of unemployment compensation in the District of Columbia is clear in the text of the statute, its regulations, its legislative history and this Court's precedents. This Court has held

[5] Ironically, *Best Chairs* involved a transfer of the employee to another full-time position with full benefits rather than remaining in her old position which was changed to part-time with no benefits. 895 N.E.2d at 728. Here, employer CAN offered no such transfer option to Ms. Tielman (who was not able to receive a full-time position or full benefits). In the District, the law on "transfer" is stated in 7 DCMR § 311.6(c) ("transfer from one type of work to another which is reasonable and necessary" shall not constitute good cause connected with the work for voluntary leaving). Thus, even as to transfer to another full-time job, the issue in *Best Chairs*, the District does not use the "unfair or unjust" test.

repeatedly that the purpose of the District's Act is not to protect the employer in economic downturns, but rather "to protect *employees* against economic dependency caused by temporary unemployment and reduce the need for other welfare programs." *Cruz,* 633 A.2d at 69 (emphasis added); *see also Jones v. D.C. Unemployment Comp. Bd.*, 395 A.2d 392, 395 (D.C. 1978); *Cohen v. District Unemployment Compensation Bd.*, 83 U.S. App. D.C. 222, 223, 167 F.2d 883, 884 (1948) ("the Unemployment Compensation Act [must] be interpreted in accordance with its purpose"). This Court has repeatedly held that to accomplish this statutory purpose, "generally, the [unemployment compensation] statute should be construed liberally, whenever appropriate to accomplish the legislative objective of minimizing the economic burden of unemployment." *Bublis*, 575 A.2d at 303; *Green v. District of Columbia Dep't of Employment Servs.*, 499 A.2d 870, 875 (D.C. 1985) (*quoting Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164, 170-71 (D.C. 1979)). That "economic burden of unemployment" falls on the employee, not the employer. It is the employee who is entitled to the financial humanitarian aid of the law.

B. CAN's nonprofit status does not affect Ms. Tielman's entitlement to benefits.

The remedial purpose of the unemployment compensation law applies equally to non-profits like CAN. Indeed, many of this Court's precedents concern unemployment benefits to employees of non-profits. *See Beynum*, 998 A.2d 316; *Chimes District of Columbia v. King,* 966 A.2d 865 (D.C. 2009); *Coalition for the Homeless v. D.C. Dep't of Employment Servs.*, 653 A.2d 374 (D.C. 1995); *Cruz*, 633 A.2d 66. Employees who have accepted lower salaries to work for nonprofit organizations that provide community services should not be penalized when seeking unemployment benefits. And however laudable CAN's desire to continue serving individuals with mental illness by reducing hours rather than cutting staff, the inquiry in this case is not

about CAN's motives but rather the effect of its actions. The fact remains that a substantial reduction in compensation can be – and in this case, was – good cause to resign for an employee like Ms. Tielman, who have financial obligations to their families that they can no longer afford to meet.

CAN cites D.C. Code § 51-103(h), which gives non-profit employers the option, not available to other employers, of electing direct liability for unemployment benefits. Pet. Br. at 24. That provision, however, does not exempt employees of non-profits from entitlement to unemployment benefits and does not bear on Ms. Tielman's right to those benefits. If anything, this reference suggests that CAN may have elected not to pay for unemployment insurance. But even if that is the case, CAN's choice is no reason to deprive Ms. Tielman and her family of this important statutory protection. That the District gives non-profits this choice and that CAN – to use its own words that it applied pejoratively to Ms. Tielman, Pet. Br. at 22 – decided to "take a chance" on self-financing its obligations to the unemployed is not a reason to create a new exemption to the statutory entitlement of a non-profit's former employees.

CONCLUSION

For all the reasons set forth above, the final order of the Administrative Law Judge granting unemployment compensation benefits to Ms. Tielman should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this brief of Respondent to be delivered by first-class mail, postage prepaid, this _____ day of October 2011 to:

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