STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1043

Tim A. Lebakken,
Relator,

vs.

Express-A-Button Inc,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 10, 2008
Reversed
Minge, Judge

Department of Employment and Economic Development
File No. 4529-07

Tim A. Lebakken, N13641 Palomino Lane, Trempealeau, WI 54661-7234 (pro se relator)

Express-A-Button, Inc., 28458 Selke Road, Dakota, Minnesota 55925-4187 (respondent employer)

Lee B. Nelson, Katrina I. Gulstad, Department of Employment and Economic Development, First National Bank Building, 332 Minnesota Street, Suite E200, St. Paul, MN 55101-1351 (for respondent department)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

MINGE, Judge

Relator challenges the decision of the unemployment law judge (ULJ) that he is disqualified from recovering unemployment benefits, arguing that he did not quit his employment, or, if he did quit, that it was for good reason caused by his employer. We reverse.

FACTS

Relator Tim Lebakken began working as an offset pressman for respondent Express-A-Button, Inc. (EAB) in March 2006. Lebakken's work station was located approximately three feet from that of another pressman, Dan Goedey. The record indicates that Goedey was offensive. Lebakken complained to management several times about Goedey's behavior. His behavior included angry outbursts, extensive profanity, throwing objects, and hiding needed work items. Although management spoke to Goedey and indicated it would try to increase the distance between work stations, there was no change.

In late December 2006, Goedey used Lebakken's press, discovered that it needed new rollers, and ordered replacement parts. Before leaving work on Friday, February 2, 2007, Lebakken saw that the new rollers had arrived. When Lebakken returned to work on February 6, 2007 and was unable to locate the replacement rollers, he assumed that Goedey had installed them. But when Lebakken attempted to operate the press, he realized the rollers were missing. At this point, Lebakken looked for Goedey and saw that he was asleep. Lebakken decided not to wake him for fear of an angry outburst.

Lebakken assumed that Goedey must have hidden the rollers and became upset. He left work and did not return.

Lebakken applied to the Department of Employment and Economic Development (DEED) for unemployment benefits. DEED concluded that Lebakken had quit his job without good reason caused by his employer and denied him benefits. Lebakken appealed this decision to an ULJ. The ULJ held that Lebakken had quit because of his conflict with a coworker, that his employer was not responsible for the conflict, and that the conflict was not sufficient to cause a reasonable person to quit. The ULJ denied benefits and affirmed this decision on reconsideration. This certiorari appeal follows.

D E C I S I O N

I.

Lebakken argues that he did not quit working at EAB or, in the alternative, that he left for good reason caused by his employer. An employee who quits employment is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 1 (2006). An employee quits "when the decision to end the employment was, at the time the employment ended, the employee's." *Id*., subd. 2(a) (2006). An employee is discharged "when any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity." *Id.*, subd. 5(a) (2006).

Whether an employee quit or was discharged is a question of fact. *Midland Elec., Inc. v. Johnson*, 372 N.W.2d 810, 812 (Minn. App. 1985); *see also Vargas v. Nw. Area Found.*, 673 N.W.2d 200, 204 (Minn. App. 2004), *review denied* (Minn. March 30,

2004). We will uphold a ULJ's findings of fact if they are supported by substantial evidence, viewing those findings in the light most favorable to the ULJ's decision. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). In addition, we defer to a ULJ's credibility determinations. *Id.* at 345.

Here, the ULJ found that Lebakken quit his job at EAB. The record shows that Lebakken walked off the job of his own volition. No supervisor or other employee at EAB told Lebakken that he should cease working there. He testified that, after he discovered that the press was inoperable, he "was just fed up" and "had enough of the stuff that [Goedey] had did to me" and that he did not really quit, but "just walked out because I was fed up with it . . . ." Based on this record, we conclude that substantial evidence supports a finding that Lebakken decided to end the employment and that this action constitutes a quit.

II.

An employee who quits employment may nonetheless receive unemployment benefits if the employee "quit the employment because of a good reason caused by the employer." Minn. Stat. § 268.095, subd. 1(1). A good reason caused by an employer is a reason "(1) that is directly related to the employment and for which the employer is responsible; (2) that is adverse to the worker; and (3) that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment." *Id.*, subd. 3(a)(1)–(3). The test for reasonableness in this context is objective and is applied to the average person, not the supersensitive. *See Ferguson v. Dep't of Employment Servs.*, 311 Minn. 34, 44 n.5, 247 N.W.2d 895, 900 n.5 (1976);

Haskins v. Choice Auto Rental, Inc., 558 N.W.2d 507, 511 (Minn. App. 1997). Whether a person has a good reason to quit is a question of law, reviewed de novo. *Rootes v. Wal-Mart Assocs., Inc.*, 669 N.W.2d 416, 418 (Minn. App. 2003); *Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000) (holding that harassment by coworkers and a supervisor may constitute good reason to quit).

Adverse working conditions may provide a good reason to quit caused by the employer if the employee complains to the employer, and the employer is given a reasonable opportunity to correct the adverse condition. Minn. Stat. § 268.095, subd. 3(c) (2006). We have held that harassment by coworkers, if not corrected, may constitute a good reason to quit caused by an employer. *See Wetterhahn v. Kimm Co.*, 430 N.W.2d 4, 6 (Minn. App. 1988) (stating that "[h]arassment by a co-worker may constitute good cause to quit where the employer had notice of the harassment, but failed to take timely and appropriate measures to prevent it."); *Tru-Stone Corp. v. Gutzkow*, 400 N.W.2d 836, 838-39 (Minn. App. 1987) (holding that harassment by coworkers and a supervisor constituted good reason to quit when not corrected by employer).

If an employee complaining of harassment is "'provided with the expectation of assistance from his employer'" in eliminating the harassment, the employee must continue to apprise the employer of additional harassment. *Tru-Stone*, 400 N.W.2d at 838 (quoting *Larson v. Dep't of Econ. Sec.*, 281 N.W.2d 667, 669 (Minn. 1979)); *see also Haskins.*, 558 N.W.2d at 511 ("When an employee complains about an alleged fear of working conditions and receives an expectation of assistance, the employee has a duty to complain further if the conditions persist.").

Thus, when an employer fails to take appropriate actions within its power to remedy harassment, good cause for a quit exists. *See Wetterhahn*, 430 N.W.2d at 6-7. In *Wetterhahn*, an employee quit after being orally abused by a coworker. *Id.* at 5. The employee complained several times, but the employer took no action to relieve her other than telling the employee that her supervisor would "keep an eye on" the coworker. *Id.* We concluded that the employer had it within its power to take further action, but had failed to give the employee adequate assistance, reversed the commissioner, and held that the employee had good cause to quit. *Id.* at 6-7. Similarly, in *Tru-Stone*, we held that a harassed employee had good cause to quit when, after multiple complaints to his employer, the only assistance he received occurred when his plant manager tried to get the employee and the coworker to "get along." 400 N.W.2d at 838-39. We agreed with the commissioner that the employee received no reasonable expectation of assistance. *Id.* at 838.

The ULJ found that Lebakken did not quit because of good reason caused by his employer because Lebakken testified that "this wasn't an employer issue, it was with a fellow coworker." This finding does not eliminate the good-reason-caused-by-the-employer basis for benefits because, as the earlier discussion of the caselaw indicates, egregious, unaddressed conduct by a fellow employee can be good cause for a quit.

Here, the record reflects that Goedey abused Lebakken with pervasive use of profanity and angry outbursts, threw objects at Lebakken, played music so loud that Lebakken could not hear others in the shop, and hid ink and parts Lebakken needed to operate his press. Lebakken walked away from the job when rollers needed to operate his

press were missing and he believed that the coworker had hidden them. He stated in his original application for benefits that the circumstances at work made him nervous and sick to his stomach, and that there were times when he broke out with a rash all over his body. He testified that he was depressed and in treatment. It does not appear that Lebakken was overly sensitive. Lebakken stated in his application for benefits that he was the seventh employee to leave because of this coworker and that after he left, EAB's owner, Cindy Bergler, called him and stated that she did not blame him for quitting. During the hearing, Bergler stated that Goedey is a "hard person to work with." On these undisputed facts in the record, we conclude Goedey's actions constitute harassment.

Lebakken testified that he complained of Goedey's behavior to Bergler, EAB's owner, two or three times and to his immediate supervisor, Bergler's son, five or six times. He never received assistance from the immediate supervisor. According to Lebakken, the supervisor would respond to complaints by saying, "Well, that's Dan" or simply leaving the area to avoid confrontation with Goedey. This testimony is uncontroverted. After Lebakken complained to Bergler, she spoke with Goedey about working better as a team. Bergler informed Lebakken of this conversation, but advised Lebakken that she would not terminate Goedey. The conversation did nothing to change the situation.

As a possible remedy for the hostile work environment, Bergler proposed moving either Lebakken or Goedey's press so the two were not working so close to each other. The ULJ found this proposal was made in December 2006. However, the presses had not yet been moved when Lebakken quit two months later. Thus, the record indicates that

after seven to nine complaints to his employer, the only assistance EAB provided was one conversation between Bergler and Goedey and an unfulfilled plan to move a press by a few feet.

This history of non-action is akin to that in *Tru-Stone* and *Wetterhahn*. If an employer simply admonishes a highly disruptive employee in hopes that he or she will improve and does not take more effective, available steps, the victimized employee does not have a reasonable expectation of assistance. Here, Bergler had informed Lebakken that she would not consider terminating Goedey. Lebakken received no assistance from his supervisor. The stress had begun to affect his physical and mental health. Other employees had quit. We conclude that, when Lebakken returned to work and could not run his press because of missing parts and then faced the prospect of having to awake Goedey and endure yet another angry, profane outburst to find the parts necessary to do his job, the harassment condition was one a reasonable employee would find intolerable. Based on this record, we conclude that Lebakken quit for good reason attributable to the employer and that he is entitled to unemployment benefits.

Reversed.

Dated: