STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0574

Norwood R. F. Baybridge,
Relator,

vs.

City of Ortonville,
Respondent,

Commissioner of Veterans Affairs,
Respondent.

Filed July 1, 2008
Affirmed
Halbrooks, Judge

Minnesota Department of Veterans Affairs
OAH Docket No. 58-3100-17672-2

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Julie Anne Fleming-Wolfe, 1922 Grand Avenue, St. Paul, MN 55105 (for respondent city)

Lori Swanson, Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent commissioner)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Johnson, Judge.

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

HALBROOKS, Judge

Relator, a military veteran, worked as a licensed emergency medical technician for an ambulance service operated by respondent. Relator challenges the commissioner's determination that relator was not terminated, constructively or otherwise, by the ambulance service. Because we conclude that the record supports the commissioner's factual findings and the commissioner correctly applied the law to the findings, we affirm.

FACTS

Respondent City of Ortonville operates the Ortonville Ambulance Service, which is staffed by approximately 16 volunteers. Mandatory monthly meetings are held for scheduling. Volunteers sign up for 12 shifts plus one weekend in order of their seniority. If a volunteer must miss a scheduling meeting, he can ask another volunteer to sign him up.

Relator Norwood R. F. Baybridge is an honorably discharged military veteran. He is a licensed emergency medical technician (EMT), whom respondent hired on December 5, 2004.[1] Relator is also a member of the National Disaster Medical System, an organization that until recently was within the Federal Emergency Management Agency (FEMA).

On July 6, 2006, relator, nurse Carlin Keimig, and another ambulance-service employee transferred a patient from Ortonville to a hospital in the Minneapolis-St. Paul

[1] Despite the "volunteer" designation, relator was paid per call as an EMT.

area. Soon after this patient transfer, FEMA informed relator that his services were needed in Maryland from July 26, 2006 to October 2, 2006.

In early August 2006, after relator had left for Maryland, Keimig made an oral complaint to Tom Scoblic, the director of the ambulance service and a member of its board of directors, about relator's conduct during the July 6, 2006 patient transfer. Keimig provided a written complaint to Scoblic on August 21, 2006. According to Keimig, relator fell asleep for a portion of the trip and used the ambulance phone to make personal calls. Scoblic discussed this complaint with the other two members of the ambulance service's board of directors at the board's August 2006 meeting. The board also discussed reports that relator failed to drive fast enough when responding to emergencies and that he had a general lack of rapport with his co-employees. The board concluded that relator's conduct was not in keeping with the professionalism expected of ambulance-service employees. But instead of terminating relator's employment, the board decided to ask for his resignation. The board members also discussed how to accommodate relator's continued employment if he declined their request to resign, as the board did not intend to terminate his employment if he refused to resign.

On October 4, 2006, a few days after relator returned home from Maryland, Scoblic told relator about the complaints and asked for his resignation. Relator refused to resign. At some later point in their conversation, relator gave Scoblic the pager that he needed to respond to emergency calls. At no time during their conversation did Scoblic tell relator that his employment with the ambulance service was terminated, as he was

authorized by the board to only ask for relator's resignation. But it is undisputed that both men knew that relator could not take any further emergency calls without his pager.

On October 10, 2006, relator filed with respondent a request for a hearing under the Veterans Preference Act (VPA), Minn. Stat. § 197.46 (2006), regarding his perceived employment termination. Relator was informed that his employment had not been terminated and that the Ortonville City Council would consider the complaints against him at its November 6, 2006 meeting. At this meeting, the city council concluded that only minimal disciplinary action was appropriate in the form of a written warning and some additional supervisory measures. The city council determined that relator should be allowed to take emergency calls again and directed Scoblic to return his pager.

Scoblic met with relator the next day, returned his pager, and told relator that he was free to sign up for shifts with the ambulance service. But Scoblic also told relator that the shift schedule was filled for the month of November, as the October sign-up meeting had occurred while the disciplinary action against relator was pending before the city council.

Relator chose not to attend the November scheduling meeting to sign up for December shifts for personal reasons. As a result, relator was not scheduled for any shifts in December 2006.

Several days after relator missed the November meeting, Scoblic met with relator's counsel. Scoblic acknowledged that some employees of the ambulance service were angry with relator but stated that several other employees, including himself, would willingly work with relator. Scoblic also indicated to relator's counsel that other

employees had offered to give up their own shifts so that relator could work. Nevertheless, relator subsequently petitioned the Minnesota Department of Veterans Affairs for a hearing, alleging that he had been removed from his EMT position. Relator's counsel also sent respondent a letter, stating that relator would not return to work until respondent agreed to resolve what relator viewed as a "hostile [work] environment" at the ambulance service. On the advice of his counsel, relator did not attend the December scheduling meeting or ask anyone else to sign him up for shifts. As a result, relator had no shifts in January 2007.

A hearing was held before an administrative law judge (ALJ) on January 18, 2007, regarding relator's claim that respondent had removed him as an employee of the ambulance service without the hearing required by the VPA. Although relator's and Scoblic's testimony concerning relator's relinquishment of this pager differed, the ALJ credited Scoblic's version of events, finding that relator voluntarily offered to turn his pager over to Scoblic and that Scoblic accepted the offer. The ALJ recommended a ruling in favor of respondent, finding that relator had voluntarily turned in his pager on October 4, 2006, and that relator's claim of a hostile work environment is not supported by the record. The Commissioner of Veterans Affairs subsequently adopted the ALJ's findings, conclusions, and recommendation in its entirety in an order dated February 20, 2007. This appeal follows.

D E C I S I O N

I.

Relator challenges the Commissioner of Veterans Affairs' order adopting the findings, conclusions, and recommendation of the ALJ that relator's claim be denied. On appeal to this court, factual determinations made by the commissioner will be upheld if they are supported by substantial evidence contained in the record as a whole. *Harr v. City of Edina*, 541 N.W.2d 603, 605 (Minn. App. 1996). "Substantial evidence" consists of more than "some" or "any" evidence; it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Pawelk v. Camden Twp.*, 415 N.W.2d 47, 50 (Minn. App. 1987). But whether the VPA is applicable to a particular set of circumstances is a question of law, which we review de novo. *Ochocki v. Dakota County Sheriff's Dep't*, 464 N.W.2d 496, 497 (Minn. 1991).

Relator's claim under the VPA is based on rights granted to him by Minn. Stat. § 197.46 (2006). Under this provision and case law interpreting it, an honorably discharged military veteran cannot be removed from a position of public employment "except for incompetency or misconduct shown after a hearing," Minn. Stat. § 197.46, or due to a good-faith elimination of the position held by the veteran. *State ex rel. Boyd v. Matson*, 155 Minn. 137, 141-42, 193 N.W. 30, 32 (1923). The dispute here centers on whether relator was "removed" from a position of public employment. Addressing the issue of what constitutes removal of a veteran from a position, the supreme court has held that "a veteran is removed from his or her position or employment when the effect of the employer's action is to make it unlikely or improbable that the veteran will be able to

return to the job." *Meyers v. City of Oakdale*, 409 N.W.2d 848, 850-51 (Minn. 1987). Relator contends that he was removed within the meaning of the VPA when he relinquished his pager to Scoblic and when respondent failed to correct what relator claimed was a hostile work environment at the ambulance service.

A. Termination based on relator's relinquishment of his pager.

The commissioner found that relator voluntarily relinquished his pager to Scoblic after he refused to resign and that the issue of disciplinary action against relator was "unresolved," with the city council to decide whether to impose any disciplinary measures. The commissioner concluded that because relator chose to voluntarily "give up the pager . . ., there can be no constructive discharge by [r]espondent." Relator does not challenge the commissioner's findings of fact regarding his relinquishment of the pager but contends that Scoblic's request that he resign and the fact that without his pager he was prevented from responding to any emergency calls amounted to removal under the VPA.

It is undisputed that relator refused to resign, as Scoblic requested. Scoblic's request that relator resign, by itself, does not make it "unlikely or improbable" that relator would be able to continue his employment with the ambulance service. *See Meyers*, 409 N.W.2d at 850-51. Scoblic knew that he was not authorized by the board to terminate relator's employment and that relator, as a veteran, could not be removed from his position without a hearing. Furthermore, Scoblic and the other ambulance board members had already discussed how to appropriately integrate relator back into the service's staffing procedures should he refuse to resign. Thus, Scoblic's communication

of the board's desire that relator resign cannot be construed as a termination of his employment or amount to removal under the VPA.

We agree with relator that he could not respond to emergency calls for service without his pager. But it is also undisputed that the board returned relator's pager to him on November 7, 2006, enabling him to once again take calls. Relator's argument overlooks the fact that his inability to take service calls for a time period was attributable to his own voluntary actions in turning over his pager to Scoblic and in his decision not to attend the scheduling meetings.

Minn. Stat. § 197.46 provides that no veteran "shall be removed" without notice and a hearing. Case law establishes that removal under the VPA must in some fashion be attributable to the employer. *See Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. App. 1999) (accepting the fact that the veteran involuntarily resigned from his position of public employment as a result of mental illness but rejecting his claim that he was due a hearing under the VPA because the resignation, although involuntary, was not "attributable to the employer"). The commissioner credited Scoblic's account of what transpired when he asked relator to resign on October 4, 2006, and relator refused to do so. Ultimately, the board did not recommend termination to the city council, and relator's pager was returned to him. The record well supports the commissioner's determination that the VPA was not violated by this sequence of events.

B. Constructive discharge due to a hostile work environment.

Relator's second claim is that a hostile work environment at the ambulance service amounted to constructive discharge because other employees refused to work with him.

A "constructive discharge occurs when an employee resigns in order to escape intolerable working conditions." *Navarre v. S. Wash. County Sch.*, 652 N.W.2d 9, 32 (Minn. 2002) (quotation omitted). In order to establish constructive discharge, an employee must show that the employer created intolerable working conditions with the intention of forcing the employee to resign or that the employer could reasonably foresee that its actions would result in the employee's resignation. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412-13 (Minn. App. 1995). "Intent can be proven with direct or circumstantial evidence, or it can be inferred upon a showing that the employee's resignation was a reasonably foreseeable result of the employer's conduct." *Id*. at 413. Whether the conditions were in fact intolerable for the employee are judged by a reasonable-person standard. *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997).

At the hearing before the ALJ, relator testified that an unspecified number of co-employees did not like him and that several refused to work with him. But he also testified that he personally believed that he could work with any employee of the ambulance service. Testimony from the three members of the ambulance service's board of directors confirmed that certain employees did not enjoy working with relator and that at least one employee apparently refused to work with him. But their testimony also established that the monthly sign-up schedule was intentionally formulated in a manner so that those who did not want to work with relator could avoid doing so, that relator could have signed up for shifts if he had attended the meetings, that several employees expressly stated that they would work with relator, and that other employees offered to

give up one of their December 2006 shifts to relator if he wanted to work. Based on this testimony, the commissioner concluded that the "evidence as a whole does not support . . . an environment so hostile it would amount to a constructive discharge."

The commissioner's conclusion is supported by the record. First, relator produced no evidence that respondent created a hostile work environment, much less created the hostile environment with the intention of forcing relator to stop signing up for shifts each month. Under the relevant law, he was required to make this showing. *See Pribil*, 533 N.W.2d at 412-13. Furthermore, even assuming for the sake of argument that respondent did create the hostile working environment to force relator to quit, it is questionable whether the hostility rose to the magnitude necessary to support a claim of constructive discharge. For example, there is no evidence of any type of harassment, threats, discrimination, or similar conduct directed toward relator. It appears that only one of the ambulance service's employees refused outright to work with relator; others simply preferred to work with someone else. It is also undisputed that there were employees identified who expressly stated that they were willing to work with relator. Furthermore, special accommodations were made, or offered, to relator to ensure that he could sign up for shifts if he desired. Although the personality conflicts between relator and other members of the ambulance service may not have made working conditions ideal, the record supports the commissioner's determination that they were not so intolerable that a reasonable person would have felt compelled to quit.

II.

Relator's last issue concerns a discovery matter. Relator sent 16 requests for admission to respondent on December 18, 2006. Respondent did not respond until January 5, 2007, some 18 days later. But the applicable rule of discovery provides that a party has ten days from the date of receipt of requests for admission to return them.[2] Minn. R. 1400.6800 (2005) (addressing requests for admission in contested administrative hearings). Noncompliance with this deadline "will result in the subject matter of the request being admitted unless it can be shown that there was a justifiable excuse for failing to respond." *Id*. Relator raised this issue at the beginning of the hearing, and the ALJ stated that, because the requests were made right before the Christmas and New Year's holidays, she would excuse respondent's late reply. Relator contends that this decision was error and that respondent's tardiness should have resulted in the subject matter of the requests being admitted as facts at the hearing.

Given the nature of the requests, if they were deemed admitted, all the critical facts would have been decided in relator's favor. The supreme court has previously disapproved of using requests for admission in this manner when the lateness of the response is minimal. *Dahle v. Aetna Cas. & Sur. Ins. Co.*, 352 N.W.2d 397, 402 (Minn. 1984) ("To allow [a party] to rely on technicalities to obtain the admission of critical factual issues subverts the information gathering purpose of the discovery rules."). Based on this record, the commissioner's conclusion that the holiday season provided a

[2] It is unclear from the record precisely when respondent received these requests for admission.

justifiable excuse for the minimally late response was not an abuse of discretion. *See id.* (stating that "allowing a[] [time] extension [to reply to a request for admission] is within the discretion of the [district] court" in the context of the discovery provisions of the Minnesota Rules of Civil Procedure).

Affirmed.