STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1151

Mavis Angell,
Relator,

vs.

Martinson Marvin M.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed June 4, 2012
Reversed
Connolly, Judge

Department of Employment and Economic Development
File No. 26986471-3

Amy J. Doll, Fluegel, Anderson, McLaughlin & Brutlag, Chartered, Morris, Minnesota (for relator)

Gordon H. Hansmeier, Victoria A. Lupu, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for respondent Martinson)

Lee B. Nelson, Minnesota Department of Employment and Economic Development, St. Paul, Minnesota (for respondent department)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Collins, Judge.*

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

CONNOLLY, Judge

In this certiorari appeal, relator challenges the decision of the unemployment-law judge (ULJ) that she was ineligible for unemployment benefits because she quit her employment without a good reason caused by her employer. Because the ULJ (1) erred as a matter of law in determining that relator was required to report sexual harassment to the employer where the harasser was the employer-owner, (2) failed to ensure that all relevant facts were fully and clearly developed, and (3) made credibility determinations that are not supported by substantial evidence in the record, we reverse.

FACTS

Relator Mavis Angell began working for respondent-employer Marvin M. Martinson insurance agency (the agency) in November 1998.[1] Marvin Martinson (Marvin) owned the agency, was an active agent, and was regularly in the office. Marvin's son, Calvin Martinson (Calvin), also worked at the agency, served as the office manager and employee supervisor, and handled all personnel matters. Relator testified that Marvin began sexually harassing her in June 2010, when he told her that her

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

[1] In the title of the action, the employer is incorrectly referred to as "Martinson Marvin M." However, absent a motion, "[t]he title of the action shall not be changed in consequence of the appeal." Minn. R. Civ. App. P. 143.01.

"perfume smelled so good it drove him wild and [relator] looked so sexy." Marvin also began asking relator for hugs. During this time, Marvin's wife suffered from terminal cancer, and several employees testified that it was not unusual for employees to hug Marvin at work. Relator testified that on December 28, 2010, while she was in Marvin's office, he allegedly told her he needed a hug, pushed his chest against her breast, put his hand underneath her blazer, and tried to kiss her, and that, a day or two later, Marvin again approached her, grabbed her, touched her breast, and attempted to kiss her.

Relator complained of harassment to a fellow employee, who suggested that she speak with Marvin's pastor about the behavior. The pastor recommended that relator contact a lawyer, which she did. Relator's last day of work was December 30, 2010, shortly after the second kissing incident allegedly occurred. However, relator did not officially quit until January 10, 2011, when her lawyer sent the agency a letter notifying it of relator's resignation and informing it that relator believed she was subjected to sexual harassment and would seek unemployment benefits as a voluntary termination with good cause.

On January 27, 2011, the Department of Employment and Economic Development (DEED) issued a determination that relator was eligible, which the agency appealed. An evidentiary hearing was conducted on March 3, 2011, and continued to March 17, 2011.

At the evidentiary hearing, Beth Kraftheffer, a family friend of the Martinsons who had no prior personal relationship with relator, testified on relator's behalf. Kraftheffer testified that in 2010, while she was visiting Marvin's dying wife, Marvin sexually harassed her. She testified that Marvin would tell her that he needed a hug, then

pull her into an elevator, kiss her, and touch her inappropriately. Because of Marvin's behavior, Kraftheffer decided to pull her insurance from the agency. At Marvin's wife's funeral in November 2010, Kraftheffer told relator why she had pulled her insurance from the agency, and relator disclosed that she had also been sexually harassed by Marvin. In December 2010, Kraftheffer sent a letter to Marvin's sons describing Marvin's harassment and her discomfort.

Three employees also testified as witnesses. None of them had witnessed sexual contact between relator and Marvin, apart from the occasional hug. But one employee testified that relator told her on several occasions that relator was uncomfortable with Marvin's hugs. The employee told relator that she should discuss her discomfort with either Marvin or Calvin. Relator testified that she asked Marvin to stop his behavior on several occasions, and he apologized, but the behavior continued. Relator testified that she did not discuss her problems with Calvin, her supervisor, because she was afraid for her job and felt that, as Marvin's son, he would not believe her and would cover up for his dad, so telling him "wouldn't have done any good." The three employees testified that Calvin was very approachable and they believed he would be willing to address any serious employment concerns.

The ULJ issued a decision finding that relator quit without good reason caused by the employer, and that relator was therefore ineligible for benefits. The ULJ concluded that, "[t]here is no support that sexual harassment, as defined by the statute occurred," and held that relator was required to provide her employer with notice of the alleged sexual harassment. Relator submitted a request for reconsideration, alleging that: (1) she

was not required to provide notice of the alleged harassment because Marvin is the owner of the agency; and (2) she was entitled to a new evidentiary hearing because one witness, Kraftheffer, had not provided full testimony at the hearing. The ULJ found that relator had not shown that her employer was aware of the sexual harassment "because such knowledge should be imputed to the employer when the alleged harasser is the owner. . . . Calvin was the one running the office and . . . . [Relator] clearly did not make Calvin aware of any sexual harassment issue." The ULJ also found that there was no need for additional testimony from relator's witness and therefore affirmed her decision. This appeal follows.

D E C I S I O N

When reviewing the decision of a ULJ, we may affirm the decision, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the relator may have been prejudiced because the findings, inferences, conclusion, or decision are "(1) in violation of constitutional provisions; (2) in excess of the statutory authority or jurisdiction of the department; (3) made upon unlawful procedure; (4) affected by other error of law; (5) unsupported by substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious." Minn. Stat. § 268.105, subd. 7(d) (2010). "This court views the ULJ's factual findings in the light most favorable to the decision." *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). This court will not disturb a ULJ's findings when they are substantially sustained by the evidence. *Id.*

"After the conclusion of the hearing, upon the evidence obtained, the unemployment law judge must make findings of fact and decision . . . ." Minn. Stat. § 268.105, subd. 1(c) (2010). "When the credibility of an involved party or witness testifying in an evidentiary hearing has a significant effect on the outcome of a decision, the unemployment law judge must set out the reason for crediting or discrediting that testimony." *Id.* If a credibility determination significantly affects the outcome of the case, the ULJ is required to make specific findings on credibility. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007) (citing Minn. Stat. § 268.105, subd. 1(c) (Supp. 2005)). "The credibility of witnesses generally is the "exclusive province of the ULJ and will not be disturbed on appeal." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). This court will affirm a credibility determination if the ULJ's findings are supported by substantial evidence and provide the statutorily required reason for the credibility determination. *Wichmann*, 729 N.W.2d at 29.

"Whether an employee had good cause to quit is a question of law, which we review de novo." *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 384 (Minn. App. 2005). An employee who quits without good reason caused by the employer is disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 1 (2010). A good reason caused by the 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) (2010). "The

standard of what constitutes good cause [to quit] is the standard of reasonableness as applied to the average man or woman . . . ." *Portz v. Pipestone Skelgas*, 397 N.W.2d 12, 13 (Minn. App. 1986) (quotation omitted).

An individual "has a good reason caused by the employer for quitting if it results from sexual harassment of which the employer was aware, or should have been aware, and the employer failed to take timely and appropriate action." Minn. Stat. § 268.095, subd. 3(f) (2010). "Sexual harassment means unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication of a sexual nature" that has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. *Id.*

To establish that an employer was aware of sexual harassment, the employee must ordinarily notify the employer of the sexual harassment. *Munro Holding*, 695 N.W.2d at 387. "Notice to the employee's supervisor or upper-level management provides the employer with the knowledge required to discipline harassing employees or otherwise remedy inappropriate conduct." *Id.* However, a victim of sexual harassment is not required to complain to management "when the circumstances demonstrate that the employer should have had knowledge of the harassment." *Id.* Where the employer, and not a coworker or supervisor, is the harasser, the court infers that the employer was, or should have been, aware of the sexual harassment. *Id.*

Here, the ULJ erred as a matter of law in concluding that relator's sexual harassment claim failed because she did not tell her employer about the sexual

harassment. It is undisputed that Marvin owned the agency. The ULJ concluded, however, that because Calvin was running the office and relator "did not make Calvin aware of any sexual harassment issue," that relator failed to make her employer aware of the sexual harassment.

Munro Holding, had a similar fact pattern. There, the employee was sexually harassed by the owner and did not formally complain to her supervisor. *Id.* at 388. But "[i]n light of [owner's] position as employer-owner and the patently offensive nature of his conduct, [the employee] was not required to formally complain to her supervisor or management to notify [the employer] of the sexual harassment." *Id.* Therefore, the ULJ erred as a matter of law in concluding that relator was required to notify Calvin, her supervisor, of the harassment, in order to impute awareness of the sexual harassment to respondent.[2]

Moreover, the ULJ's determination that no sexual harassment occurred is not supported by substantial evidence in the record.[3] In reaching the conclusion that no sexual harassment occurred, the ULJ made a credibility determination, finding:

> Calvin Martinson's [and the other three employees'] testimony to be more credible than [relator's] testimony regarding any sexual harassment and Calvin being approachable and willing to address serious issues, because it was more convincing, they corroborated each other, and it was less self serving. *If Marvin was doing these inappropriate things* as claimed by [relator], then she needed to give the employer the opportunity to address

[2] DEED filed a letter of concession admitting that relator did not need to demonstrate that she told her supervisor of the sexual harassment in order to meet the good-cause exception.

[3] Our decision does not mean that we find sexual harassment occurred. Rather, it simply means that the ULJ's decision to the contrary is not supported by the record because of the numerous errors.

> the problem and she did not. The evidence supports that it was Calvin who ran the office and [relator] should have gone to him with any complaint. It is not logical that fear of being fired would stop her from complaining to Calvin, when she would rather quit. There is no support that sexual harassment, as defined by the statute occurred.

(Emphasis added.) While the ULJ found that no sexual harassment had occurred, the ULJ's reasoning is very muddled and it is difficult to differentiate whether she made findings regarding the specific incidents alleged by relator, or whether she simply dismissed all of relator's allegations because relator did not report any harassment to her supervisor. Read in context, it appears as though the ULJ's credibility determinations and finding that no sexual harassment occurred are based on the erroneous conclusion that relator was required to report sexual harassment to her supervisor in order for her to demonstrate good cause for quitting.

Moreover, the ULJ's credibility determinations are inadequate. Testimony is often self-serving and to simply say that the testimony was "convincing" does not explain *why* it was convincing. *See* Minn. Stat. § 268.105, subd. 1(c) (stating that the ULJ must set forth his or her reasons for crediting or discrediting testimony). For example, the ULJ found that, "Marvin aside, no one else in the office was aware of any problem or observed anything like Marvin grabbing [relator], kissing her, or touching her inappropriately." Yet the ULJ also found that relator had mentioned to one of the employees "on a few occasions that she was uncomfortable with Marvin's hugs." This directly contradicts the ULJ's finding that none of the agency employees was aware of any problem. Additionally, the ULJ's credibility determination was based on the fact that Calvin and the other agency employees all testified that they had not witnessed any

inappropriate or sexually harassing behavior. They testified that the office had an open floor plan and that Marvin did not usually arrive at the office until after other employees were there, making it unlikely that Marvin could have harassed relator without any other employee's knowledge. However, Calvin testified that Marvin did arrive at work early some mornings and another employee testified that relator was usually the first one in the office. Thus, there was evidence in the record that both relator and Marvin arrived at the office early some mornings. This evidence undermines the ULJ's determination that harassment did not occur because none of the other employees witnessed it.

Finally, while the ULJ found the testimony of Calvin and the agency employees to be more credible than relator's testimony, the ULJ did not have the alleged harasser, Marvin, testify. Despite the fact that Marvin was the only individual who could have potentially denied relator's accusations, when relator asked if she could question Marvin, the ULJ told the pro se relator that it was "not appropriate" to question him. "The [ULJ] must ensure that unrepresented parties receive a fair hearing." *Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 527 (Minn. App. 2007). The ULJ is also responsible for assisting unrepresented parties in presenting evidence and must "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b). Rather than assisting relator and requesting that Marvin himself testify, the ULJ allowed Calvin to provide hearsay testimony on the alleged harassment. Calvin testified that Marvin admitted to hugging relator and admitted that he probably did "bump" relator's breast.

As a whole, the testimony from Calvin and the other three agency employees did not support the ULJ's credibility determination and finding that there was no sexual harassment. All four testified that they had not witnessed any harassment, but Marvin, the only person who could directly refute the accusations, did not testify. Finally, one of the employees testified that she was aware that relator was uncomfortable with Marvin's hugs. Viewed as a whole, the record does not support the ULJ's credibility determinations, which, in addition to the ULJ's error of law and failure to ensure that all relevant facts were fully and clearly developed, leads us to reverse the ULJ's decision.

Reversed.