STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2148

Sherron Y. Reese,
Relator,

vs.

Augsburg College,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed September 9, 2013
Affirmed; motion granted
Johnson, Chief Judge

Department of Employment and Economic Development
File No. 29939104-3

Marcus A. Jarvis, Jarvis & Associates, P.C., Burnsville, Minnesota (for relator)

Augsburg College, Minneapolis, Minnesota (respondent)

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

Considered and decided by Johnson, Chief Judge; Ross, Judge; and Bjorkman, Judge.

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

JOHNSON, Chief Judge

Sherron Y. Reese was employed by Augsburg College until she quit on the ground that she was being harassed and treated unfairly by her supervisor. An unemployment law judge determined that Reese is ineligible for unemployment compensation benefits because she quit her employment without a good reason caused by the employer. We affirm.

FACTS

Reese was an academic advisor at Augsburg College from November 2010 to June 2012.[1] During an evidentiary hearing before an unemployment law judge (ULJ), Reese testified to several situations in which she felt she was harassed.

The first incident concerned a negative performance evaluation, which Reese received in February or March 2011. Reese's supervisor, Alyson Olson, testified that she made "a list of concerns," which eventually became a formal "performance improvement plan." Reese believed that the performance improvement plan was unfair and had several meetings with Olson and representatives of the human resources department to discuss the plan and Reese's relationship with Olson. Assistant vice president of human

[1]In its responsive brief, the department of employment and economic development (DEED) moved to strike pages 6-21 of Reese's appendix. The challenged document consists of a chronological outline of Reese's employment at Augsburg College. The record on appeal consists of the "papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. "An appellate court cannot base its decision on matters outside the record on appeal and any matters not part of the record must be stricken." *Mitterhauser v. Mitterhauser*, 399 N.W.2d 664, 667 (Minn. App. 1987). The document challenged by DEED was not submitted to the ULJ. Thus, we grant DEED's motion to strike.

resources Andrea Turner recommended that Olson convert the performance improvement plan into a "training plan" because Reese was a relatively new employee. Olson complied and revised the plan to specify several areas in which Reese could improve her work performance. Reese was assured that the plan was not intended to punish her but, rather, was intended to ensure that she received adequate training.

A second incident concerned a donation of two laptops to two students in October 2011. After some miscommunication and confusion, Olson decided to give one laptop to one student and to create a process by which a second person would receive the second laptop. A Caucasian student received the first laptop; an African American student for whom a laptop had been requested did not receive one. Reese testified that Olson did not inform her of the reasons for distributing the laptops in that manner. Reese believes that Olson's decision was motivated by race.

A third incident concerned a presentation made by Reese in February 2012. The assistant director of the program for which Reese worked, Kevin Cheatham, asked Reese to give him a presentation that she previously had given to visitors of the admissions office. After Reese did so, Cheatham told her that "everything [she] said was incorrect" and that the presentation was not helpful. Reese testified that he spoke to her in a very "mean and harsh" tone. Reese testified that she asked Cheatham how she could improve the presentation, but Cheatham did not respond. She also testified that Cheatham and Olson gave her conflicting instructions regarding whether she should train on a certain computer program and that Cheatham excluded her from a meeting that she felt she should have attended.

Reese met with Turner more than once to express concerns about the way she was being treated. After a May 2011 meeting, Turner investigated Reese's concerns and determined that Olson treated Reese no differently than she treated any other employee in the department. Turner also determined that other employees had been required to undergo the same training provided by Reese's training plan. In February 2012, Reese again met with Turner, Olson, and other members of the department to discuss her training plan. At that time, Reese had completed one-third of the objectives in the training plan. At the meeting, Olson suggested that Reese develop her own plan to complete the remaining objectives. Turner also offered to meet with Reese to help her accomplish the objectives, but Reese did not follow up on the offer.

In April 2012, Reese went on a medical leave of absence. She testified that the leave of absence was caused by stress and harassment at work. Her physician filled out an FMLA form by stating that Reese's leave was due to depression and anxiety related to "harassment and mistreatment at work."

In June, Reese quit her job. Reese testified that she quit "based on the past history with the environment of the office" and because the harassment continued to get worse and she did not want to return.

In late June, Reese applied for unemployment benefits with the department of employment and economic development. The department initially determined that she is ineligible. After she filed an administrative appeal, a ULJ held an evidentiary hearing. In September, the ULJ determined that Reese did not have good reason to quit caused by the employer and that Reese did not have a serious illness that made it medically necessary

for her to quit. Reese moved for reconsideration, and the ULJ affirmed the earlier decision.

Reese appealed to this court by way of a petition for writ of certiorari. In the appendix to her appellate brief, Reese included an affidavit in which she states that, after the ULJ issued her decision, she did research and learned that the ULJ is an alumna of Augsburg College. Reese states in the affidavit that she immediately contacted the chief ULJ to report that the ULJ should have recused herself because she is an Augsburg alumna. Reese states that the chief ULJ told her that he could not consider her request for relief because the case already was pending in this court.

D E C I S I O N

I. Recusal

Reese first argues that the ULJ's decision should be reversed on the ground that the ULJ is an alumna of the employer, Augsburg College.

In its responsive brief, DEED cites the following administrative rule, which governs recusal of ULJs:

> *An unemployment law judge must remove himself or herself from any case where the judge believes that presiding over the case would create the appearance of impropriety.* No judge may hear any case where any of the parties to the appeal are related to the judge by blood or marriage. A judge must not hear any case if the judge has a financial or personal interest in the outcome. A judge having knowledge of such a relationship or interest must immediately remove himself or herself from the case.
>
> Any party may move for the removal of a judge by written application of the party together with a statement of the basis for removal. Upon the motion of the party, the chief

> unemployment law judge must decide the fitness of the judge to hear the particular case.

Minn. R. 3310.2915 (emphasis added).

The parties do not discuss the standard of review that applies to the question whether a ULJ should recuse from an administrative appeal. For purposes of this case, we believe that it is useful to consider the standard of review applicable to judges in the judicial branch. The supreme court has stated that "appellate judges must be allowed some discretion in deciding their own disqualification under any particular set of facts." *Powell v. Anderson*, 660 N.W.2d 107, 116 (Minn. 2003). Because the question of recusal "requires an objective examination of whether the judge's impartiality could reasonably be questioned," however, "any discretion must be tempered by the unavoidable conflict of interest that is presented when a judge considers his or her own disqualification." *Id.* Accordingly, the supreme court has held that a *de novo* standard of review applies to the question whether an appellate judge erred by declining to recuse from a case. *Id.* Likewise, the supreme court has held that a *de novo* standard of review applies to the question whether a district court judge erred by declining to recuse from a case. *In re Jacobs*, 802 N.W.2d 748, 750 (Minn. 2011). Because the rule governing recusal of ULJs requires an objective determination as to whether there is an "appearance of impropriety," we conclude that a *de novo* standard of review should apply.

The question to be decided is whether a ULJ's "presiding over the case would create the appearance of impropriety" if the ULJ's alma mater is a party to an administrative appeal. *See* Minn. R. 3310.2915. We are unaware of any Minnesota

caselaw on that particular issue or on the related issue whether a judge in the judicial branch should recuse if the judge's alma mater is a party to a case before the judge. But courts in other jurisdictions have considered and decided the latter issue and are uniform in holding that a judge need not recuse on the sole ground that his or her alma mater is a party to a case.

For example, in *Lunde v. Helms*, 29 F.3d 367 (8th Cir. 1994), the United States Court of Appeals for the Eighth Circuit held that a district court judge did not abuse his discretion by denying a motion to disqualify him from a case filed against university officials and the university from which the judge had graduated from law school. *Id.* at 369-70. The court stated that it did not believe that "the district judge's having graduated from the university law school, even though the university is a party defendant, without more, is a reasonable basis for questioning the judge's impartiality." *Id.* at 370. Subsequently, in *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002), the Eighth Circuit considered an argument that the district court judge should have recused himself from the case because he graduated from the defendant university and made charitable contributions to the university. *Id.* at 1043, 1049. The court stated that the plaintiff's argument was "wholly without merit" and "reject[ed] it emphatically." *Id.* at 1049. Other jurisdictions similarly have concluded that a judge need not recuse himself or herself simply because the judge's alma mater is a party to a case. *See, e.g.*, *Harris v. Board of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll.*, 409 F. App'x 725, 727 (5th Cir. 2010); *Marcavage v. Board of Trustees of Temple Univ.*, 232 F. App'x 79, 82-83 (3d Cir. 2007); *Easley v. University of Michigan Bd. of Regents*, 906

F.2d 1143, 1147 (6th Cir. 1990); *Brody v. President & Fellows of Harvard Coll.*, 664 F.2d 10, 11 (1st Cir. 1981); *A.H. Belo Corp. v. Southern Methodist Univ.*, 734 S.W.2d 720, 722 (Tex. App. 1987). We are not aware of any caselaw holding that a district court judge's mere status as an alumnus or alumna of a university or college requires recusal from a case involving the university or college.

Reese argues that the ULJ should have recused from her administrative appeal solely because she is an alumna of Augsburg College. But the caselaw indicates that a judge need not recuse himself or herself solely because he or she is an alumnus or alumna of a school that is a party to a case. We conclude that the ULJ's consideration of Reese's case did not create an appearance of impropriety. *See* Minn. R. 3310.2915. Thus, the ULJ did not err by not recusing herself from Reese's administrative appeal.

II. Reason for Quit

Reese also argues that the ULJ erred by determining that she is ineligible for unemployment benefits on the ground that she quit her employment with Augsburg without a good reason caused by the employer. Reese does not challenge the ULJ's finding that she did not have a serious medical condition that made it necessary for her to quit.

This court reviews a ULJ's decision denying benefits to determine whether the findings, inferences, conclusions, or decision are affected by an error of law, are unsupported by substantial evidence in view of the entire record, or are arbitrary or capricious. *See* Minn. Stat. § 268.105, subd. 7(d) (2012). The ULJ's factual findings are viewed in the light most favorable to the decision being reviewed. *Skarhus v. Davanni's*

Inc., 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination whether an employee is eligible for unemployment benefits is a question of law, to which this court applies a *de novo* standard of review. *Id.*

An employee who quits employment is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 1 (2012). "A quit from employment occurs when the decision to end the employment was, at the time the employment ended, the employee's." *Id.*, subd. 2(a). But an employee who quits employment is eligible for benefits if the employee quit "because of a good reason caused by the employer." *Id.*, subd. 1(1). 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). These three requirements "must be applied to the specific facts of each case." *Id.*, subd. 3(b).

Generally, the circumstances causing an employee to quit with good cause "must be real, not imaginary, substantial not trifling, and reasonable, not whimsical." *Ferguson v. Department of Emp't Servs.*, 311 Minn. 34, 44 n.5, 247 N.W.2d 895, 900 n.5 (1976). These circumstances do not include "situations where an employee experiences irreconcilable differences with others at work or where the employee is simply frustrated or dissatisfied with his working conditions." *Portz v. Pipestone Skelgas*, 397 N.W.2d 12, 14 (Minn. App. 1986).

Reese contends that she was required to work in a hostile work environment, that her supervisors harassed her, and that the harassment adversely affected her health. She

contends that she quit "because the harassing behavior she received would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment."

The ULJ found, "The preponderance of the evidence shows that Reese quit because she felt that she was unfairly required to complete a training plan." The ULJ also found that the training plan was reasonable and that the circumstances to which Reese testified "would not compel an average, reasonable employee to quit the employment and become unemployed." The ULJ specifically referred to Reese's testimony that a manager spoke to her in a harsh tone, that Reese was not included in a particular meeting, and that she received conflicting information about how to prepare a presentation and whether she should learn a specific computer program. The ULJ further found that Olson testified credibly and provided reasonable explanations for the incidents about which Reese complained, that the incidents did not show that Reese was subjected to racial harassment, and that there was no other evidence that Reese quit because of racial harassment. Based on these findings, the ULJ concluded that Reese did not quit for a good reason caused by the employer.

On appeal, Reese does not attack any particular finding or explain why any of the ULJ's findings are clearly erroneous. Rather, she simply restates her general assertions that she worked in a hostile environment and that she was subjected to harassment that would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment. Reese and Augsburg's employees offered conflicting testimony about the incidents alleged by Reese and the underlying motives for the

training plan. The ULJ determined that Augsburg's representatives credibly testified that Reese was not being harassed. This court must defer to the ULJ's credibility determinations. *See Skarhus*, 721 N.W.2d at 345. In addition, Reese's own testimony shows that she was merely "frustrated or dissatisfied" with her working conditions and did not get along well with some of her colleagues, which is insufficient to establish the requirements of a quit for good reason caused by the employer. *See* Minn. Stat. § 268.095, subd. 3(a); *Portz*, 397 N.W.2d at 14.

Thus, the ULJ did not err by determining that Reese did not have a good reason caused by the employer for quitting her employment. Therefore, Reese is ineligible for unemployment benefits.

Affirmed; motion granted.