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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1023**

Preston L. Kelley,
Relator,

vs.

Taher Acquisition Corp.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed June 10, 2008
Affirmed
Connolly, Judge**

Department of Employment and Economic Development
File No. 3652 07

Preston L. Kelley, 3680 Lancaster Lane North, Apt. 308, Plymouth, MN 55441-1890 (pro se relator)

Taher Acquisition Corp., 5570 Smetana Drive, Minnetonka, MN 55343-9022 (respondent)

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

Considered and decided by Ross, Presiding Judge; Toussaint, Chief Judge; and Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Relator challenges the unemployment-law judge's (ULJ) decision to disqualify him from receiving unemployment benefits. The ULJ concluded that relator had been sexually harassed, but quit before management was able to take corrective steps. Because relator failed to provide respondent-employer with an opportunity to take timely and appropriate action, we affirm.

FACTS

Relator Preston Kelley began working for respondent Taher Acquisition Corp. on October 16, 2006. Approximately three months later, relator's supervisor, Mark Good, kicked him in the buttocks, laughed, and blew kisses at him. Relator was upset and notified operations manager, Mark Augustine, of the incident. Augustine admonished Good and informed him that this type of behavior was not acceptable. Later that evening, Good apologized to relator, who brushed it off, saying, "Yeah, okay, don't let it happen again."

About a week later, on February 1, 2007, Good pinched relator on the buttocks and blew kisses at him. Relator was angry and threw a milk carton at Good, who ran away. According to Taher, a coworker witnessed the incident and reported it to management on February 6, 2007.¹ Acting on that information, Augustine approached relator, but he declined to discuss the incident. The next day, however, relator contacted

¹ Relator asserts that he notified Augustine of the incident that day, but was unable to meet with the general manager until February 9. This factual dispute does not affect the analysis.

Augustine and agreed to talk about what had occurred. Augustine determined that they needed to discuss the incident with the general manager. Relator and Augustine met with the general manager that day, and the general manager informed them that this behavior would not be tolerated and that she would be speaking with Good.

Relator was not scheduled to work over the weekend. On Monday, February 12, he decided he did not feel comfortable working with Good, so he called Augustine and told him that he was quitting.

Thereafter, relator applied for unemployment benefits. The ULJ determined that relator did not quit for a good reason caused by employer and was therefore disqualified from receiving unemployment benefits. Relator requested reconsideration of that decision, but the ULJ affirmed, concluding that the decision was both legally and factually correct. This certiorari appeal follows.

DECISION

The standard of review is set forth in Minn. Stat. § 268.105, subd. 7(d) (2006), which provides:

The Minnesota Court of Appeals may affirm the decision of the unemployment law judge or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioner 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.

An appellate court will review factual determinations in the light most favorable to the decision. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 377 (Minn. 1996). The factual findings can be overturned if there is not substantial evidence in the record to support them. *Skarhus v. Davanni's*, 721 N.W.2d 340, 344 (Minn. App. 2006). This court gives deference to the ULJ's credibility determinations. *Id.* (citing *Jenson v. Dep't of Econ. Sec.*, 617 N.W.2d 627, 631 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000)). Whether an individual quit employment and the reason the individual quit are questions of fact for the ULJ. *Hayes v. K-Mart Corp.*, 665 N.W.2d 550, 552 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). This court, however, reviews de novo the legal question of whether the applicant falls under one of the exceptions to disqualification under Minn. Stat. § 268.095, subd. 1 (2006). *Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000).

An applicant who quits employment is disqualified from receiving unemployment benefits unless one of eight enumerated exceptions applies. Minn. Stat. § 268.095, subd. 1. The statute provides in pertinent part: "An applicant who quit employment shall be disqualified from all unemployment benefits according to subdivision 10 except when: (1) the applicant quit the employment because of a good reason caused by the employer as defined in subdivision 3[.]" *Id.*

Good cause is defined as 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 (2006). “An applicant 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.” *Id.*, subd. 3(f).

The ULJ determined that relator was inappropriately harassed at work. He further concluded, however, that relator quit before respondent-employer had an opportunity to react to the harassment. Whether relator had a good reason caused by the employer to quit is a question of law reviewed de novo by this court. *Peppi*, 614 N.W.2d at 752.

To qualify for unemployment benefits in the context of quitting because of alleged sexual harassment, the employee must provide the employer with an opportunity to take timely and appropriate action. Minn. Stat. § 268.095, subd. 3(f). “Timely and appropriate action may include following an established anti-harassment policy, disseminating a new policy, transferring the harassing employee to another shift, or taking disciplinary action against the harassing employee.” *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 388 (Minn. App. 2005). Relator quit before such appropriate action could be taken. After the first instance of misconduct, relator told the operations manager, and Good was immediately reprimanded. The second incident occurred approximately one week later. There is a dispute as to whether relator immediately told Augustine of that incident, but it is clear that the meeting with the general manager occurred sometime the following week. At that meeting, the general manager informed relator that such conduct was not acceptable and that she would take immediate action to

deal with the problem. Relator quit several days later, without allowing adequate time for management, which had promptly responded to his first complaint, to handle the situation. The ULJ summarized this analysis:

The evidence shows that Taher Acquisition took timely action in response to [relator's] complaints. While it may be true that [relator] complained initially in January, after which the problem recurred, Taher promised to take strong action after the February 1 incident. [Relator] quit before knowing what was going to be done, or not done, with regard to this supervisor. While [relator] may have found the situation unacceptable, he was required, before quitting, to ascertain whether further action was going to be taken. Consequently, [relator] did not quit for good reason under the statute, and is disqualified from receiving unemployment benefits.

The record indicates that Taher was properly responding to relator's complaints, but relator quit before management could take action on his second complaint. Therefore, relator was properly disqualified from receiving unemployment benefits.

Affirmed.