STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1945

Ross J. Davison,
Relator,

vs.

Tiziani Golf Car of Minnesota LLC,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 11, 2009
Affirmed
Worke, Judge

Department of Employment and Economic Development
File No. 21061401-3

Ross J. Davison, 9800 Logan Avenue South, Apt. 9, Bloomington, MN 55431 (pro se relator)

Tiziani Golf Car of Minnesota LLC, 1400 First Avenue East, Shakopee, MN 55379 (respondent employer)

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 Bjorkman, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

WORKE, Judge

Relator challenges the decision of the unemployment-law judge (ULJ) that he quit without good reason caused by the employer and is ineligible to receive unemployment benefits, arguing that (1) he did not quit because he refused to work a new schedule, but was discharged after he reported safety violations; (2) the ULJ failed to conduct a fair hearing; (3) he should have been permitted to subpoena records to support his claim that he was driving in excess of the maximum allowable hours; and (4) the decision was unfair because his coworkers in the same situation were determined eligible for benefits. We affirm.

D E C I S I O N

Determination of Ineligibility

Relator Ross J. Davison argues that the ULJ erred in determining that he was ineligible for unemployment benefits. In reviewing the decision of the ULJ, we may affirm the decision, remand 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) (Supp. 2007). "We view the ULJ's factual findings in the light most favorable to the decision, giving deference to the credibility determinations made by the ULJ. In doing so, we will not disturb the ULJ's factual findings when the evidence substantially sustains them." *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006) (citations omitted).

Relator argues that the ULJ erred in finding that he quit his employment as a driver for respondent Tiziani Golf Car of Minnesota LLC, a distributor and dealer of club cars, golf cars, and short-term golf car rentals. 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). A quit occurs "when the decision to end the employment was, at the time the employment ended, the employee's." Minn. Stat. § 268.095, subd. 2(a) (Supp. 2007). A discharge occurs "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) (Supp. 2007).

A review of the record shows that Tiziani's management held a meeting with its three truck drivers to discuss a new schedule. Prior to the meeting, the drivers determined their own schedules, but management decided it needed more control to better accommodate customer needs. Management proposed an on-call dispatch and told the drivers that they would be required to be available to work weekends because it was becoming difficult to find a driver willing to work on the weekends. Relator stated that that type of schedule would not work for him and that Tiziani would have to fire him. The general manager replied that he did not want to terminate anybody, but stated that if

relator did not like the schedule, he would accept his resignation. Relator replied, "Fine." The record supports the ULJ's finding that based on relator's words and actions—he was upset by the new schedule and indicated his unwillingness to work under the proposed schedule—he quit his employment. Based on the evidence, Tiziani did not intend to discharge relator, nobody told him that he was discharged, and no statement was made to relator from which he could have reasonably interpreted that he was discharged.

Having determined that relator quit his employment, he may still be eligible for benefits if he quit because of a good reason caused by the employer. *See id.*, subd. 1(1) (Supp. 2007). The ULJ found that relator did not quit his employment because of a good reason caused by the employer. A good reason caused by the employer is a reason that is directly related to the employment and for which the employer is responsible, that is adverse to the employee, and that would compel an average, reasonable employee to quit and become unemployed rather than remain in the employment. *Id.*, subd. 3(a) (Supp. 2007). "[T]here must be some compulsion produced by extraneous and necessitous circumstances." *Ferguson v. Dep't of Employment Servs.*, 311 Minn. 34, 44 n.5, 247 N.W.2d 895, 900 n.5 (1976). The reasonable-worker standard is objective and is applied to the average person rather than the supersensitive. *Id.* "The determination that an employee quit without good reason attributable to the employer is a legal conclusion, but the conclusion must be based on findings that have the requisite evidentiary support." *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). When the quit has been established by the employer, the burden shifts to the employee to show

that he had good reason to quit. *Edward v. Sentinel Mgmt. Co.*, 611 N.W.2d 366, 368 (Minn. App. 2000), *review denied* (Minn. Aug. 15, 2000).

Relator argues that he did not want to continue his employment if that meant violating the Department of Transportation's regulations by driving in excess of 60 hours per week. "Illegal conduct by an employer may constitute good cause for an employee to quit." *Hawthorne v. Universal Studios, Inc.*, 432 N.W.2d 759, 762 (Minn. App. 1988). Generally, an employee "must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the employer for quitting." Minn. Stat. § 268.095, subd. 3(c) (Supp. 2007); *see also Burtman v. Dealers Disc. Supply*, 347 N.W.2d 292, 294 (Minn. App. 1984) (stating that an employee's failure to complain to the employer about an adverse working condition "forecloses" a finding of good reason caused by the employer), *review denied* (Minn. July 26, 1984).

But an employee need not first complain to preserve his ability to seek unemployment benefits when "an employer violates federal trucking laws related to [] public safety." *Parnell v. River Bend Carriers, Inc.*, 484 N.W.2d 442, 445 (Minn. App. 1992). In *Parnell*, the employee was frequently required to drive more hours than were permitted under federal highway laws and was required to submit inaccurate driver logs. *Id.* at 443. The employer admitted that it violated trucking regulations. *Id.* at 444.

The evidence does not support relator's argument that a new schedule would require drivers to drive in excess of legally permitted hours. The record shows that there was never a comment made as to how many hours a driver would be scheduled to drive

and that Tiziani was well aware of, and would remain compliant with, the maximum-hour laws. Thus, relator was never told that he would have to drive over 60 hours per week. Relator assumed that he would be driving over 60 hours per week because he claimed that he was already driving 60 hours Monday through Friday, and if he drove on the weekends he would be over 60 hours per week. But as the ULJ concluded, while drivers were told that they might need to be available to drive seven days a week, they would not be required to actually drive seven days a week. Therefore, relator's conclusion that he would be driving in excess of the legally permitted hours was purely speculative.

Relator claims to have called and complained to two agencies, but he did not present this evidence during the hearing. The ULJ, however, considered this information when relator requested reconsideration and determined that it would not change the outcome because the evidence did not show that the employer violated any law. Further, an employer's representative testified that Tiziani had been made aware that drivers previously had driven in excess of 60 hours per week. But if there had been a violation, it was seemingly inadvertent and the employer made a good-faith effort to comply by proposing a new schedule. Relator separated from his employment before he even tried the proposed schedule; thus, relator did not even know when he would be driving or how many hours per week he would be scheduled to drive. Based on the entire record, the ULJ did not err in finding that relator quit without a good reason caused by the employer and is ineligible for unemployment benefits.

Fair Hearing

Relator also argues that the ULJ failed to conduct a fair hearing because he was irritable, interrupted witnesses, and only allowed the witnesses to present evidence in the form of direct quotes. A ULJ conducts a hearing "as an evidence gathering inquiry and not an adversarial proceeding." Minn. Stat. § 268.105, subd. 1(b) (Supp. 2007). The ULJ "must ensure that all relevant facts are clearly and fully developed." *Id.* The ULJ has a duty to "exercise control over the hearing procedure in a manner that protects the parties' rights to a fair hearing." Minn. R. 3310.2921 (2007). A hearing generally is considered fair and even-handed if both parties are afforded an opportunity to give statements, cross-examine witnesses, and offer and object to evidence. *See Ywswf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529-30 (Minn. App. 2007).

Our review of the transcript shows that the ULJ treated every witness the same and attempted to extract the evidence relevant to relator's separation from employment. The ULJ took testimony from all of the witnesses and allowed the parties to cross-examine witnesses. The ULJ instructed the witnesses to testify to the best of his or her recollection, and not to give summaries, interpretations, impressions, or perceptions. The ULJ interrupted witnesses when the testimony was irrelevant or was not making sense, and told the witnesses to narrow testimony to what happened at the meeting that resulted in relator's separation from employment. Thus, the ULJ conducted a fair hearing.

Subpoenas

Relator also argues that he was not permitted to subpoena evidence that would have shown that he was driving in excess of 60 hours per week. The ULJ has the

authority to "issue subpoenas to compel the attendance of witnesses and the production of documents and other personal property considered necessary as evidence in connection with the subject matter of an evidentiary hearing." Minn. Stat. § 268.105, subd. 4 (Supp. 2007). At the conclusion of the hearing, relator stated that he attempted to subpoena log sheets that showed when the drivers worked. The ULJ stated: "Well, you never requested a subpoena from me at the beginning of the hearing." Relator stated that he did not know that he had to do that first. If relator believed that the evidence was relevant, he needed to request a subpoena before the hearing, which he failed to do.

The ULJ also stated that he was not sure if the evidence was relevant. There was testimony that it was brought to the employer's attention that drivers had driven in excess of 60 hours per week and that the meeting was scheduled, in part, to address this concern and make sure that changes to the schedule would prevent this from happening in the future. Because there was evidence from the employer supporting relator's claim that the drivers had previously driven in excess of 60 hours per week, the log sheets were not necessary.

Similarly-Situated Employees

Finally, relator argues that the ULJ's decision should be reversed because two other drivers who were separated from employment under the same circumstances were determined to be eligible for unemployment benefits. The ULJ considered this argument and noted that "[t]he fact that two other employees . . . who were separated [from employment] at the same [time], may have been granted unemployment benefits is not determinative of this matter. Each case is decided based upon its own facts and merits."

The Minnesota Supreme Court has addressed this argument. *See Pichler v. Alter Co.*, 307 Minn. 522, 523, 240 N.W.2d 328, 329 (1976). The supreme court determined that the department has no legal obligation to issue identical decisions in similar cases. *Id.* at 524, 240 N.W.2d at 329. The court stated that without statutory directive, the department is not "obliged to exercise its discretion in every case with inflexible consistency." *Id.* Therefore, relator's argument that he should be eligible for unemployment benefits because two drivers who were separated from employment allegedly under the same circumstances were determined to be eligible for benefits is without merit.

Affirmed.