STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1209

Ramona Wuertz-Maselter,
Relator,

vs.

U S Water Service Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 20, 2010
Affirmed
Connolly, Judge

Department of Employment and Economic Development,
File No. 21975193-3

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U S Water Service Inc., Cambridge, Minnesota (respondent)

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Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

Relator appeals from a denial of unemployment benefits, arguing that the unemployment-law judge (ULJ) did not make sufficient findings as to whether relator experienced adverse working conditions; erred in focusing on whether relator complained to management; and abused his discretion in declining to hold an additional evidentiary hearing. Because we conclude that the record substantially supports the ULJ's finding that relator failed to notify her employer of any adverse working conditions, making findings regarding the actual existence of such conditions unnecessary, and that the ULJ did not abuse his discretion in denying relator's request for an additional evidentiary hearing, we affirm.

FACTS

Relator Ramona Wuertz-Maselter worked for respondent U S Water Service Inc. (US Water) from June 23 to December 16, 2008. She worked as a quality-control intern and was paid $10 per hour. Although relator worked full time, the position was temporary. Sometime in September or October, relator's supervisor, Duane Weber,[1] talked to her about becoming a permanent employee.[2] A retroactive raise was to

[1] The ULJ spelled Weber's name as "Dwayne Webber." However, both relator and US Water spell it as "Duane Weber," so we use this spelling. We note that Weber never spelled his name for the record.

[2] The ULJ found that this conversation occurred in early November. This finding is not supported by the record as both relator and Weber testified to initial conversations concerning the position prior to November, although they did not agree on when. Relator believed they occurred in September; Weber stated that he submitted his initial request for her employment on October 14.

accompany the position. Weber submitted an initial request on October 14, and was subsequently required to provide additional documentation to support the request that the position be made permanent.

It took Weber a few days to gather the information. During this time, relator regularly followed up with Weber regarding the position. Weber told relator that the position was "in the works" and that he had not yet received a response, even though he had not yet submitted the required paperwork. A few days later, relator continued to press Weber about the position and Weber admitted that he had not submitted the additional documentation. Relator was upset that Weber misled her. Weber received approval for the permanent position on November 13. On November 14, Weber presented the details of the permanent position to relator; relator would be paid $13 per hour, which would be retroactive to November 3.

Relator was dissatisfied with the wage and asked if she would be eligible for an early review so she could qualify for a raise. Weber responded that relator would not be eligible for an early review as relator had already worked for several months at US Water and wages were reviewed after a year. On November 18, relator tried to further negotiate via an education benefit. Relator e-mailed Weber and Tenille Hermanson, the human resources coordinator, stating she was willing to accept the position if she would be eligible for the education benefit outlined in the employee handbook. After consulting with Hermanson, Weber told relator that US Water required employees to work at least one year before they qualify for the education benefit. Relator submitted a written resignation letter to Hermanson on December 3, stating "I am no longer able to extend

my participation in your temporary QC student internship program. My last day will be Thursday, December 18, 2008. Thank you for the opportunity to participate in this program."

After submitting her resignation, relator disagreed with Weber's instructions on shipping a product, believing they were unsafe and violated US Water's policies. Relator called the corporate marketing manager, who had requested the product, and voiced her concerns.[3] On December 16, relator learned that a coworker had spoken to Weber and requested time off to go to a different US Water plant and discuss a position that the coworker had been offered. Later that day, Weber called relator into his office and told her that he felt she was undermining his authority and that she should pack her belongings and leave. Relator complied.

Relator established an unemployment benefit account and was determined to be ineligible for benefits because she quit "for a personal reason not related to the employment." An evidentiary hearing was held before a ULJ. At the hearing, relator stated that she quit because she felt that Weber and Hermanson had created a hostile work environment. Relator cited Weber's lying about the status of the permanent position and getting an elevator installed; his frustrated and angry responses to her questions about hiring details; and his short and angry demeanor towards her regarding the shipment incident. Relator also said that he would not greet her in the morning or talk with her during the day. Further, relator felt a conversation Weber had with a coworker,

[3] While the ULJ found that relator had not complained to any management concerning the shipment, both relator and Weber discussed the phone call to the corporate marketing manager at the evidentiary hearing.

who was diagnosed with cancer, was inappropriate. Relator testified that she brought her concerns regarding the education benefits to Tera Ziesmer,[4] an administrative assistant who worked for Weber and had trained relator, but no one else, including human resources. Relator stated that she did not feel it would do any good speaking to management, particularly because Weber was "buddies" with his supervisor, Mary Winter. Winter also supervised Hermanson, the human resources coordinator.

Hermanson testified that relator never brought any concerns to her regarding Weber's treatment of relator or others in the workplace. When Weber was asked by the ULJ whether relator had ever told him that she felt he was lying and misleading her concerning the status of the permanent position, Weber responded:

> I think she had the impression that it had been sent off immediately because she had come before and asked what the status of the position request was and I told her that I needed to submit additional data, and that's when she began to come back and follow up, have you submitted it, have you submitted it. So I think she was frustrated with the point that it took me a few days to get that put together.

The ULJ determined relator was ineligible for unemployment benefits. Citing Minn. Stat. § 268.095, subd. 5(b) (2008), the ULJ concluded that relator quit her employment with US Water because her discharge came within 30 days of her intended quit date. In considering whether relator quit for a good reason attributable to her employer, the ULJ stated that relator felt Weber created a hostile work environment by lying and applying policies unfairly. The ULJ noted that "[i]t is adverse to the worker if

[4] The hearing transcript spells Ziesmer's first name as "Tara." Ziesmer did not testify at the hearing. Relator spells it as "Tera," so we use this spelling.

they are misled by management and held to standards that are not outlined by the employee handbook." The ULJ then concluded that relator "neither complained to management about her concerns nor allowed management an opportunity to correct the perceived adverse work conditions." Because relator failed to complain, she was not eligible to receive employment benefits.

Relator requested reconsideration, stating that the ULJ erred by focusing entirely on whether she had complained. Relator then asserted that she had complained to Hermanson, but "forgot about this conversation with her until I read your Notice of Decision." Relator reiterated that complaining would have done her no good and stated that, after her conversation with Hermanson, Hermanson "shunned" her "by giving every other employee [except her] a Christmas stocking." Relator also asserted that there were procedural errors because the ULJ failed to ask US Water about the "performance issues" and "insubordination" reasons that were given for relator's termination on the employer questionnaire.

Affirming relator's ineligibility, the ULJ concluded that the alleged conversation with Hermanson regarding relator's complaint was not supported by the evidence and the testimony given at the evidentiary hearing, which showed that relator did not complain because she felt it would do no good. Further, the ULJ ruled that any conduct that occurred after relator submitted her resignation cannot be grounds for quitting. Finally, with respect to poor performance and insubordination, the ULJ stated that (1) the discharge date was only two days before the intended quit date, thus any reasons for the discharge were moot, and (2) relator was in the best position to testify about her own

reasons for quitting and was not prejudiced by the ULJ's failure to ask the employer to explain its understanding of relator's decision to quit. This certiorari appeal follows.

D E C I S I O N

When reviewing a denial of unemployment benefits, we may affirm the decision of the ULJ, remand for further proceedings, or reverse or modify the decision if the applicant's substantial rights were prejudiced because the decision violates constitutional provisions, is the product of unlawful procedure or other legal error, is not supported by substantial evidence, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d) (2008). This court considers the ULJ's factual findings in the light most favorable to the decision and will not disturb them when they are substantially sustained by the evidence. *Peterson v. Nw. Airlines Inc.*, 753 N.W.2d 771, 774 (Minn. App. 2008), *review denied* (Minn. Oct. 1, 2008). "Whether [an applicant] is properly disqualified from the receipt of unemployment benefits is a question of law, which this court reviews de novo." *Hayes v. K-Mart Corp.*, 665 N.W.2d 550, 552 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003).

We begin by recognizing that an applicant who quits her employment is eligible to receive unemployment benefits if the applicant quit "because of a good reason caused by the employer." Minn. Stat. § 268.095, subd. 1(1) (2008). A good reason attributable to the employer is one that "is directly related to the employment and for which the employer is responsible"; "is adverse to the worker"; and "would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment." *Id.*, subd. 3(a) (2008). If an applicant quits on account of adverse working

conditions, the applicant must have previously complained to the employer and given the employer a reasonable opportunity to respond. *Id.*, subd. 3(c) (2008).

Here, it is undisputed that relator quit her employment. *See* Minn. Stat. § 268.095, subd. 5(b) ("If the discharge occurs within 30 calendar days before the intended date of quitting, then, as of the intended date of quitting, the separation from employment is considered a quit from employment . . . ."). The parties also agree that the ULJ failed to determine whether relator in fact suffered adverse working conditions on account of Weber's behavior and the application of the education-benefit policy, and instead jumped directly to whether relator had complained to US Water about the alleged working conditions.

The ULJ is required to "ensure that all relevant facts are clearly and fully developed." Minn. Stat. § 268.105, subd. 1(b) (2008). In addressing the existence of adverse working conditions, the ULJ stated: "[Relator] testified that she quit because Weber created a hostile work environment by lying to her and applying US Water's employee policies unfairly. It is adverse to a worker if they are misled by management and held to standards that are not outlined by the employee handbook." The ULJ did not make any specific findings or credibility determinations, based on relator's testimony, as to whether relator had in fact experienced adverse working conditions. *See* Minn. Stat. § 268.105, subd. 1(c) (2008) (requiring the ULJ to set out the reason for crediting or discrediting testimony when that testimony has a significant effect on the outcome of the decision). "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). But even assuming relator's allegations of hostile working conditions are true, her quit will not fall under the good-reason-caused-by-the-employer exception unless she is able to show that she gave notice and an opportunity for correction to her employer. *See* Minn. Stat. § 268.095, subd. 3(c).

An employee who fails to notify her employer of adverse working conditions "forecloses" a finding of good reason caused by her employer to quit. *Burtman v. Dealers Disc. Supply*, 347 N.W.2d 292, 294 (Minn. App. 1984), *review denied* (Minn. July 26, 1984); *see also McNabb v. Cub Foods*, 352 N.W.2d 378, 382 (Minn. 1984) (stating "notice of harassment to management is essential to a claim for benefits"). The ULJ specifically found that relator did not complain to US Water management when she believed Weber had lied to her about the permanent position or when she felt US Water's education benefit was being administered unfairly. Relator asserts that the ULJ never asked her "whether she complained to human resources regarding her supervisor's broken promises"; cut her off "when she began to explain how human resources added to the hostile work environment"; and "failed to ask the appropriate questions to build the record." We observe that, along with the duty to ensure all appropriate facts are developed, the ULJ should assist unrepresented parties in the presentation of evidence. Minn. Stat. § 268.105, subd. 1(b); Minn. R. 3310.2921 (2007). The record reflects that the ULJ repeatedly asked relator to what extent she discussed her concerns with Weber, Hermanson, Winter, or anyone else in US Water's management. Each time relator said

that she did not, explaining that she wanted to be hired and that confronting Weber "wasn't going to help" and "would not do any good."

Furthermore, although relator testified that Hermanson knew she "was frustrated because Mr. Weber had been down there multiple times talking to her, so I'm sure she was aware of the frustration," the ULJ found that relator never brought her concerns regarding Weber's behavior to the attention of management personnel. Additionally, while relator contends that Hermanson never responded to her concerns, relator only e-mailed Hermanson regarding the education benefit, and acknowledged that Weber responded to her question in person after speaking with Hermanson. Therefore, there is substantial evidence in the record to support the ULJ's finding that relator failed to inform her employer as to any adverse working conditions.

Relator contends that the ULJ abused his discretion in not granting a new evidentiary hearing when relator recalled a conversation she had with Hermanson upon receipt of the ULJ's decision. We disagree. In denying the additional hearing, the ULJ stated that relator "alleges that Hermanson was Weber's supervisor; this statement is not supported by the evidence and testimony submitted . . . which showed that [relator] failed to complain to Weber's direct manager because she felt Weber and the manager were friends and complaining would do her no good." On a request for reconsideration, the ULJ

> must order an additional evidentiary hearing if an involved party shows that evidence which was not submitted at the evidentiary hearing: (1) would likely change the outcome of the decision and there was good cause for not having previously submitted that evidence; or (2) would show that

> the evidence that was submitted at the evidentiary hearing was likely false and that the likely false evidence had an effect on the outcome of the decision.

Minn. Stat. § 268.105, subd. 2(c) (2008). We defer to the ULJ's decision whether to hold an additional evidentiary hearing and will not disturb it absent an abuse of discretion. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 345 (Minn. App. 2006). As DEED correctly points out, "[t]he ULJ had no obligation to accept [relator's] sudden realization that all of her prior testimony was wrong, and that she had actually complained to management."

To the extent that relator argues that the ULJ's reconsideration order imposes a requirement that she complain to Weber's direct supervisor, we have held that notice to personnel "clothed with supervisory and managerial authority over subordinates," though not the employee's immediate supervisor, constitutes notice to the employer. *McNabb*, 352 N.W.2d at 383 (holding employer on notice of harassment when meat-department employee complained to her immediate supervisors and meat manager, despite employer's claim that these people were not "true management" as their positions were mandated by union contract). Relator similarly contends that she raised her concerns with Ziesmer. However, the record reflects that while Ziesmer trained relator, and relator frequently talked to Ziesmer, Ziesmer was Weber's administrative assistant and does not appear to be a member of management. Viewing the ULJ's findings in the light most favorable to the decision and in light of the many times the ULJ asked relator whether she had spoken to any level of US Water's management regarding her concerns coupled with relator's consistent response that she did not because she felt it would not accomplish anything, we conclude that the ULJ did not impose any additional notification

requirements on relator and did not abuse his discretion in denying relator's request for a second evidentiary hearing.

Finally, we note that relator argues on appeal that she also suffered adverse working conditions because of a change in the terms of her employment when US Water failed to provide her a "promised" raise and that the raise was not retroactive to the date "promised." An employer's breach of the terms of employment can constitute a good reason caused by the employer for the employee to quit. *See, e.g.*, *Hayes*, 665 N.W.2d at 553-54 (holding failure to give employee promised raise violated employment agreement and gave employee good cause to quit). However, as DEED points out, relator unequivocally testified that the reason she quit was because of the hostile work environment she felt was created by Weber and Hermanson. Moreover, the ULJ specifically asked relator whether there was any other reason she quit her employment with US Water and relator said "no." Because relator did not argue that US Water breached the terms of her employment agreement to the ULJ, this argument is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating appellate courts will generally not consider matters not argued and considered below).

Affirmed.