STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1063

Andy Phelps,
Relator,

vs.

TransX Ltd.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed February 24, 2014
Reversed
Stoneburner, Judge

Department of Employment and Economic Development
File No. 30970771-3

Andy Phelps, Forest Lake, Minnesota (pro se relator)

TransX Ltd., St. Louis, Missouri (respondent employer)

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

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Toussaint, Judge.[*]

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

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

STONEBURNER, Judge

Relator challenges the determination of an unemployment-law judge (ULJ) that he is ineligible for unemployment benefits because he did not establish that he quit his employment for a good reason attributable to his employer or for medical reasons. Because we conclude that the employer's breach of the employment terms negotiated by relator and employer constituted a good reason to quit the employment, we reverse.

FACTS

In January 2013, relator Andy Phelps accepted employment as a pricing analyst at respondent TransX Ltd. (employer), based in part on employer's agreement that after his first 90 days of employment, Phelps would be allowed to work from home one day per week. Negotiating this term of employment was very important to Phelps because the roundtrip commute from his home to employer's place of business is approximately 75 miles.

In late February, after Phelps had experienced eye irritation, coughing, and the taste of smoke in his mouth from the poor air quality in the office where he worked, Phelps complained to a manager who suggested that the problem could be resolved by using a fan. Phelps disagreed that a fan would eliminate the problem, and the manager allowed him to work on a lower level of the building, away from windows. But approximately one week later the manager told Phelps that he would need to move back upstairs to work. The manager also told Phelps that he would not be allowed to work from home after his first 90 days of employment. Two days later, Phelps quit his

employment, citing employer's rescission of the work-from-home agreement and the poor air quality in the office as his reasons for doing so.

Phelps applied for unemployment benefits, and respondent Department of Employment and Economic Development (DEED) determined that Phelps had quit his employment without good reason attributable to employer, making Phelps ineligible for these benefits. Phelps appealed. After a telephone hearing, the ULJ concluded that neither employer's having reneged on the work-at-home agreement nor the air-quality problem was "sufficiently adverse to compel the average reasonable worker to quit and become unemployed, rather than remaining in the employment" and that Phelps was therefore ineligible for unemployment benefits. The ULJ noted that, at the time Phelps quit his job, there were no substantial changes in his working conditions or deprivation of an expected benefit because Phelps had not yet worked for employer for 90 days and was not yet entitled to the promised work-at-home benefit. The ULJ also concluded that a reasonable person would have been able to bear the air quality and that Phelps had not established that it was medically necessary for him to quit his employment due to the office's air quality. The ULJ affirmed the decision on reconsideration, and this appeal by writ of certiorari followed.

D E C I S I O N

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. 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 and will not be disturbed when substantially sustained by the evidence. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). The ultimate determination of whether an employee is eligible for unemployment benefits is a question of law, which this court reviews de novo. *Id.*

An employee who quits employment is generally 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) (2012). 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) (2012). These three requirements "must be applied to the specific facts of each case." *Id.*, subd. 3(b) (2012).

I. Repudiation of term of employment

An employer's breach of an employment agreement generally constitutes good cause to quit. *Hayes v. K-Mart Corp.*, 665 N.W.2d 550, 553 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). An employee is not required to complain to an employer or give them an opportunity to correct a breach of an employment agreement before quitting. *Thao v. Command Ctr., Inc.*, 824 N.W.2d 1, 11 (Minn. App. 2012) (holding that

employee need only complain when confronted with "adverse working conditions," which do not include "terms of employment that are contractual in nature").

Phelps relies exclusively on *Hayes* as authority for his argument that employer's change in the employment agreement constituted good cause for Phelps to terminate the employment. In *Hayes*, the relator quit her job because her employer failed to give her the pay raise that she had been promised. 665 N.W.2d at 552. This court concluded that prior case law clearly established that "where, as here, the employment agreement includes a promise concerning the terms or conditions of employment, a breach of that promise constitutes good cause to resign." *Id.* at 553 (citing *Krantz v. Loxtercamp Transp., Inc.*, 410 N.W.2d 24, 27 (Minn. App. 1987) (holding that employer's breach of oral promise that employee would not have to work weekends constitutes good cause for employee to quit); *Baker v. Fanny Farmer Candy Shops No. 154*, 394 N.W.2d 564, 566 (Minn. App. 1986) (holding that employer's violation of oral "understanding" that employee would not have to work nights gives employee good cause to quit)). *Hayes* specifically states that the decision is based on K-Mart's failure to honor its promise of a pay raise, and not on the statutory provision, since eliminated, that a substantial wage reduction can constitute good cause to quit attributable to the employer. 665 N.W.2d at 554.

The statutory definition of "good reason caused by the employer," as applied to adverse changes in terms of employment, has been changed since *Krantz*, *Baker*, and *Hayes* were decided. The 2002 version of the statute applied in *Hayes* defined "good reason caused by the employer," in relevant part, as a reason:

> (1) that is directly related to the employment and for which the employer is responsible; and
> (2) that is significant and would compel an average, reasonable worker to quit and become unemployed rather than remaining in the employment.

Minn. Stat. § 268.095, subd. 3(a) (1)-(2) (2002). In 2004, subdivision three of the statute was amended and now defines "good reason caused by the employer," in relevant part, as:

> (a) . . . 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.
> (b) The analysis required in paragraph (a) must be applied to the specific facts of each case.

Minn. Stat. § 268.095, subd. 3 (2012).

DEED argues that, as applied to the specific facts of Phelps's situation, the change in terms of employment to eliminate the work-from-home term of employment is not a circumstance that would compel an average, reasonable person to quit when Phelps's sole concern was an additional day of a 90-minute round-trip commute. *See Werner v. Med. Prof'ls LLC*, 782 N.W.2d 840, 843-44 (Minn. App. 2010) (holding that an employer's relocation from Bloomington to St. Paul, resulting in an increase of 34 miles and 50 minutes in the relator's 170-mile round-trip commute from her home in Good Thunder and denial of relator's request to work from home for part of the week was not adverse to relator and did not constitute good cause to quit attributable to employer), *review denied* (Minn. Aug. 10, 2010). But the relator in *Werner* had not negotiated a work-from-home

term of employment before accepting employment, nor is there any indication that the distance of her commute was a term of her employment.

"The unemployment-insurance law 'is remedial in nature and must be applied in favor of awarding unemployment benefits,' and 'any statutory provision that would preclude an applicant from receiving benefits must be narrowly construed.'" *Thao*, 824 N.W.2d at 4 (quoting Minn. Stat. § 268.069, subds. 2, 3 (2010)). Given this statutory mandate, we find merit in Phelps's argument that an average, reasonable person would quit employment based on an employer's breach of a negotiated work-at-home term of employment given the facts of the distance and time involved in Phelps's commute that led him to specifically negotiate this term of employment before accepting the employment. We conclude that the ULJ misapplied the law by concluding that the breach of the employment term was not adverse to Phelps and did not constitute a good reason to quit attributable to employer.

DEED has not cited any authority establishing that breach of the employment term was not a good reason to quit simply because, at the time he quit, Phelps had not yet fulfilled the condition precedent of working for 90 days. *See Matter of Haugen*, 278 N.W.2d 75, 79 n. 6 (Minn. 1979) ("It is basic hornbook law that an unconditional repudiation of a contract . . . which is communicated to the other party prior to the time fixed by the contract for his performance constitutes an anticipatory breach.") (citation omitted). When a party repudiates a contract and the non-breaching party has only partially completed its performance, the non-breaching party may act on the anticipatory breach without completing performance. *Instrumentation Servs., Inc. v. Gen. Res. Corp.*,

283 N.W.2d 902, 908-09 (Minn. 1979). Because Phelps had a good reason caused by his employer to quit his employment before he had completed 90 days of employment, the ULJ erred by concluding that he is not entitled to unemployment benefits

II. Air-quality issue

Although DEED briefed the issue of whether Phelps established that it was medically necessary to quit due to the poor air quality in his office, Phelps never asserted medical necessity as a reason for quitting, and he did not brief the issue of whether the air quality was so poor that it constituted a good reason to quit attributable to his employer. Phelps appears to argue that his employer reneged on the work-at-home promise in retaliation for his complaints about air quality, but other than the fact that these events occurred close in time, he has not presented any evidence, argument or authority to support an assertion that air-quality concerns constituted a good reason to quit his employment. Because the issue, to the extent it is raised in this appeal, was not adequately briefed by Phelps, it is waived. *See State, Dep't of Labor and Industry v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach an issue in absence of adequate briefing).

Reversed.