DIVISION ONE
FILED: 05-25-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TERRY A. NUNNALLY, Appellant, v. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an Agency, & PEARLSTEIN LAW OFFICE, PLLC, Appellees.	)	No. 1 CA-UB 09-0036 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Appeals Board of the Department of Economic Security of the State of Arizona

A.D.E.S. Appeals Board No. U-1083237-BR

AFFIRMED

Terry A. Nunnally — Tempe
Appellant *in propria persona*

Terry Goddard, Attorney General — Phoenix
By Carol A. Salvati, Assistant Attorney General
Attorneys for Appellee Arizona Department of Economic Security

Pearlstein Law Office, P.L.L.C. — Phoenix
By Suzan V. Pearlstein
Attorneys for Appellee Pearlstein Law Office, P.L.L.C.

S W A N N, Judge

¶1 Terry A. Nunnally ("Claimant") appeals the Arizona Department of Economic Security ("ADES") Appeals Board's decision disqualifying her from receiving unemployment insurance benefits. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In July or August 2007, Claimant began working as a legal secretary at Pearlstein Law Office ("the law firm" or "the firm"), where Lynn and Suzan Pearlstein are partners. Claimant separated from her employment on April 15, 2008. A few days later, she sent the Pearlsteins a letter. She wrote that "the late payroll [on April 15] was the last straw in a long line of unprofessional and inconsiderate behavior more from [Suzan] than from Lynn," and explained that Suzan's "vulgarity" and "banshee screams" were "probably the first reason that I considered leaving." She added that "[t]he pornographic emails that I was subjected to on a pretty regular basis contributed to another reason for me to leave," and alleged that "[w]hen the subject was broached with Lynn, the response was 'every secretary that has a red blooded man for a boss endures this as part of her job.'" She also complained of the Pearlsteins' unprofessional treatment of their clients and of having to frequently remind Suzan to input payroll.

¶3 On August 3, 2008, Claimant filed a "Voluntary Quit" claim with ADES for unemployment insurance, claiming that she quit because of "Harassment/Hostile Work Environment." She alleged that she had been "subjected to screaming/yelling/lewd naked pictures of women/degrading email jokes," explaining that within two months of starting work at the law firm, she was "subjected to lewd material sent via the email to [Lynn]" and was "subjected to extreme unprofessionalism by Suzan." She alleged that she had spoken to the Pearlsteins about their "unprofessionalism" and "asked them to stop and was basically told no."

¶4 An ADES deputy determined that Claimant was eligible for unemployment insurance, finding that Claimant was improperly discharged for violating a company rule. The law firm appealed the Determination of Deputy, and a hearing was scheduled before the ADES Appeal Tribunal.

Appeal Tribunal Hearing

¶5 At the hearing, Claimant testified that whenever paydays approached, employees had to give Suzan Pearlstein multiple reminders about notifying the payroll service, and Suzan missed the notification deadline several times. On an ongoing basis, with one exception involving a different employee, the payroll service nevertheless had been able to timely issue the employees' paychecks. For the April 15 payday,

however, the payroll service could not accommodate Suzan's late request, and the employees did not timely receive their pay. Claimant left work at noon on April 15 after discovering that she had not been paid, and she did not return. Her employers were not present when she left, but an employee who witnessed the event testified that Claimant "threw her arms up and said, 'That's enough. I've had it[,]' and grabbed her purse and told me to have a nice day and walked out."

¶6 Claimant received her pay on April 17 or 18.[1] When asked by the administrative law judge ("ALJ") whether she would have quit if she had never had a problem with the payroll and had been paid on time, Claimant responded, "Probably not." Later in the hearing, Claimant amended her response, explaining that she had misunderstood the question.[2] She testified that her

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[1] Claimant stated at the hearing that the amount of the paycheck "was not as much as it should have been," but she never elaborated on this point.

[2] Claimant attempted even later in the hearing to ask Suzan about her hostile behavior in the workplace. The ALJ declined to permit the introduction of new reasons for the separation at that juncture, finding that Claimant had already defined her reasons for leaving, and that those reasons did not include Suzan's allegedly unprofessional behavior. Though hostile, bullying conduct by a supervisor surely can constitute good cause for a voluntary separation, Claimant in this case had not identified such behavior as a reason for her departure and did not raise the issue at the hearing until after she affirmatively represented to the ALJ that she wished to offer no additional evidence. In these circumstances, we cannot conclude that the ALJ abused his discretion by foreclosing a new line of inquiry.

late pay was merely "the last straw of many attempts of trying to resolve the situation of the tension in the office." She then presented evidence regarding offensive e-mails she encountered at work.

¶7 The evidence was undisputed that while Claimant worked at the law firm, Lynn Pearlstein did not have a computer in his office, did his work on a smart phone, and used a law firm e-mail account to receive both business-related and personal e-mails. He did not have a personal e-mail account, although Claimant testified that such an account could have been set up on his phone. Claimant knew when she started working at the law firm that Lynn received personal e-mails at his professional account.

¶8 Claimant was responsible for accessing the account, printing e-mails, and delivering the printouts to Lynn. Regarding the scope of that responsibility, however, the parties presented conflicting evidence. Claimant testified that when she was hired, she was told to print and deliver *every* e-mail. In support of her claim, a printout of the first page of an October 2007 e-mail sent to Lynn's account, with the subject line "Fwd: IBC's Monthly Man," was admitted into evidence. The sender of that e-mail wrote: "Lynn, Thought I'd start you with

something even your secretary could appreciate. Knowing that you are 'evolved' and of the kinder, gentler nature."[3]

¶9 The former employee who trained Claimant, however, testified that she instructed Claimant to print business-related e-mails if instructed and to notify Lynn of the presence of personal e-mails. The former employee testified that she never instructed Claimant to open or print Lynn's personal e-mails. Lynn also testified that he never instructed Claimant to print his personal e-mails, although he admitted knowing that she occasionally did so.

¶10 According to Claimant, she printed all of Lynn's e-mails, both business-related and personal. She was offended by the content of some of the personal e-mails. In March 2008, Lynn began to receive – from various sources – personal e-mails that included photographs of nude or partially clothed women. Claimant conceded that there was no evidence that Lynn had solicited the e-mails. Admitted into evidence were printouts of four of the e-mails,[4] which Claimant testified were representative of many more: (1) a March 1, 2008 e-mail with the subject line "Fwd: Getting Older"; (2) a March 7, 2008 e-

[3] The content of the forwarded message is not included in the printout.

[4] Although it is not clear from the printouts that Lynn was a recipient of some of the e-mails because his e-mail address does not appear, the law firm does not dispute that he was a recipient.

mail with the subject line “Bicycle etiquette”; (3) a March 10, 2008 e-mail with the subject line “Polish barber shop”; and (4) a March 25, 2008 e-mail with the subject line “GOV. SPITZER’S GIRL.” When asked whether she knew who the person who sent one of the e-mails was, Claimant testified, “I don’t know, ee [sic] is a college buddy, and if he is an associate of Lynn Pearlstein.” She was unsure whether that individual did any business with the law firm, and she could not recall having ever seen his name on a legal document. She testified, however, that some of the Pearlsteins’ personal friends did business with the firm. Suzan disputed that testimony.

¶11 According to Claimant, she met with Suzan on March 5, 2008, to discuss one of the personal e-mails received at Lynn’s account. Suzan confirmed that at some point, Claimant showed her an e-mail and explained that she was offended. Suzan testified that she promised to talk to Lynn. Suzan told Claimant not to open Lynn’s personal e-mails. She instructed Claimant to instead notify Lynn whenever she saw a personal e-mail. According to Suzan, Lynn also spoke to Claimant about the issue.

¶12 On March 25, 2008, after printing the “GOV. SPITZER’S GIRL” e-mail, Claimant wrote Lynn a note asking him to “please have these kind of emails redirected only to your personal email.” The next day, Lynn met with Claimant to discuss the

issue. According to Lynn, he had not previously been made aware that Claimant had problems with any of his personal e-mails, and he was unaware of the content of the e-mails she had found offensive because he did not read every "joke" e-mail that she printed and delivered to him. According to both Lynn and Claimant, after their meeting Lynn promptly contacted the sender of the March 25 e-mail and then relayed the sender's apology to Claimant. According to Lynn, he also apologized to Claimant. Claimant testified that Lynn nevertheless refused to redirect his personal e-mails, and instead told her to not open e-mails that she thought were personal. It is unclear from Claimant's testimony whether she complied with Lynn's directive for the duration of her employment.[5]

Denial of Benefits

¶13 After the hearing, the Appeal Tribunal issued a written decision, in which it found that Claimant voluntarily left her employment because of the firm's failure to pay wages and because of inharmonious relations with a supervisor. The Tribunal found that Claimant's credibility was "severely

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[5] Claimant testified that after her conversation with Lynn, she tried to determine whether incoming e-mails were business-related or personal. She did not provide evidence of any personal e-mails received after March 25. She testified, however, that the offensive e-mails continued until the end of her employment.

affected" for two reasons: (1) Claimant initially testified that she probably would not have quit in the absence of a payroll issue but later changed her response to address the e-mail issue, and (2) Claimant's testimony that she was told to open and print all e-mails sent to Lynn's account, including personal e-mails, was contradicted by the testimony of the person who had trained her. Applying A.R.S. §§ 23-775 and -727, and A.A.C. R6-3-50500, R6-3-50515, R6-3-50190, and R6-3-50210, the Tribunal concluded that Claimant voluntarily quit without good cause in connection with the employment. Accordingly, the Tribunal decided that Claimant was disqualified from receiving unemployment insurance benefits, and the Determination of Deputy was set aside.

¶14 Claimant timely petitioned for review. She argued that she had good cause for quitting because she had been subjected to sexual harassment. She also contended that requiring her to determine the nature of Lynn's e-mails as personal or business-related created an "unreasonable interference with [her] doing her job efficiently and effectively." She explained that she would have faced discipline if she had misjudged the nature of an e-mail and therefore caused a filing deadline to be missed.

¶15 The Appeals Board affirmed the Tribunal's decision, expressly adopting the Tribunal's findings of fact, reasoning,

and conclusions of law. The Appeals Board also added that Claimant should have been able to determine that the offending e-mails were personal based on the identities of the senders and the initial portions of the messages, which did not include the material she found offensive.

¶16 Claimant timely requested further review and the Appeals Board again affirmed. Claimant then requested review by this court, and we, pursuant to A.R.S. § 41-1993 (Supp. 2009), granted her application for appeal.

STANDARD OF REVIEW

¶17 We view the evidence in the light most favorable to upholding the Appeals Board's decision, and will affirm the decision if any reasonable interpretation of the record supports it. *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997). That is, we will affirm if the record reveals substantial evidence to support the decision. *Rice v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 199, 201, 901 P.2d 1242, 1244 (App. 1995). We are bound by the Board's findings of fact unless they are arbitrary, capricious, or an abuse of discretion. *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989). We afford great weight to the Board's interpretation of a statute or its own regulations, but we determine *de novo* whether the interpretation was proper. *Golden Eagle Distribs., Inc. v. Ariz. Dep't of Econ. Sec.*, 180

Ariz. 565, 567, 885 P.2d 1130, 1132 (App. 1994). We also determine *de novo* whether the Board properly applied the law to the facts. *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545, 898 P.2d 492, 494 (App. 1995).

DISCUSSION

¶18 Pursuant to A.R.S. § 23-775(1) (Supp. 2009), a claimant who "left work voluntarily without good cause in connection with the employment" is disqualified for benefits unless certain conditions are met. A claimant has left work voluntarily when she intentionally terminated the employment relationship because of a condition related to employment. A.A.C. R6-3-5005(A). When a voluntary separation has been established, the claimant bears the burden of proving that she had "good cause" for leaving and that it was not for any disqualifying reasons. A.A.C. R6-3-50190(B)(2)(b); A.A.C. R6-3-50515(A)(2). Claimant's claim for unemployment benefits acknowledged that she voluntarily left her employment at the law firm, and all of the evidence presented at the hearing supported that conclusion.[6] Therefore, it was Claimant's burden to show that she left for "good cause."

¶19 On appeal, Claimant contends that she had "good cause" for leaving because by virtue of her exposure to the offensive

[6] Additionally, Claimant does not dispute on appeal that she left voluntarily.

e-mails, she was sexually harassed in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*[7] The Arizona Administrative Code does not specifically address "good cause" in the context of sexual harassment. The general test for "good cause" is set forth in A.A.C. R6-3-50210:

> A. The commonly accepted test of "good cause," when considering voluntary leaving, is "What would the reasonable worker have done under similar circumstances?" The following two points should be considered:
>
> 1. What were the claimant's reasons for leaving?

[7] Claimant does not argue on appeal that the payroll issues she identified at the Appeal Tribunal hearing gave her "good cause" for leaving. Accordingly, those issues are waived. *See, e.g., Childress Buick Co. v. O'Connell*, 198 Ariz. 454, 459, ¶ 29, 11 P.3d 413, 418 (App. 2000). We note, however, that in the absence of waiver we would conclude that based on the evidence produced at the Appeal Tribunal hearing, the payroll issues did not give Claimant "good cause" for leaving. A.A.C. R6-3-50500(C)(1) provides that "[a] claimant would have good cause for quitting if the facts clearly establish that his employer willfully refused to pay him wages that were actually due, provided that he first made a reasonable attempt to adjust his grievance." A.A.C. R6-3-50500(C)(3) adds that "[i]solated instances of late payment of wages . . . will not establish good cause for leaving."

Although Claimant suggests on appeal that the firm's failure to pay her on April 15 was a willful act that singled her out because of her recent complaints about the e-mails, she made no such argument in the proceedings leading to this appeal. Indeed, at the hearing, Claimant testified that Suzan had a perpetual problem with timely notification of the payroll service, and Claimant indicated that no employees received their pay on the April 15 payday. Additionally, Claimant produced no evidence that she made any attempt to adjust her grievance before leaving work in the middle of the day on April 15. Finally, Claimant produced no evidence that the firm was regularly late in paying Claimant or other employees.

1. Do the reasons justify leaving?

B. A worker's voluntary separation is not disqualifying if it is consistent with well defined public policy. Examples of this type of cause for leaving are:

1. Legally substandard employment.

2. Work which meets legal standards, but involves undue risk to the worker's health or safety.

C. A reasonable worker will not quit impulsively. He will attempt to maintain the employment except when this is impossible or impractical. Good cause is generally not established unless the worker takes one or more of the following steps prior to quitting in an attempt to adjust the grievance:

1. Gives the work a fair trial.

2. Attempts to adjust unsatisfactory working conditions.

3. Requests a leave of absence when necessary to resolve some personal difficulty.

D. A worker need not take such steps before quitting if they are impracticable or impossible, or would obviously not be fruitful.

The parameters of "good cause" based on working conditions, including working conditions caused by a claimant's relationship with a fellow employee or supervisor, are set forth in A.A.C. R6-3-50515:

A. General

1. The term "working conditions" includes all aspects of the employer-employee relationship . . . .

2. A worker who leaves because of dissatisfaction with working conditions, must show that one or more of these conditions are substantially below those prevailing in the area for similar work. Mere dislike, distaste, or inconvenience created by small variations in working conditions will not establish good cause for leaving work. The determination generally will turn on a comparison of the claimant's actions with the degree of tolerance the normal worker would be expected to exercise before leaving under the same conditions.

3. When an employer imposes unreasonable demands or working conditions which force a worker to terminate his employment, the worker would leave with good cause.

4. Before good cause or a compelling personal reason for leaving can be established, a worker must have attempted to adjust his grievance prior to leaving unless such an attempt was not feasible.

. . . .

C. Fellow employee

1. A worker who leaves because of inharmonious relations with a fellow employee leaves with good cause if he [sic] is established that the conditions were so unpleasant that remaining at work would create an intolerable work situation for him.

2. In determining whether a situation is intolerable, the following factors should be considered:

    a. Would continued employment create a severe nervous strain or result in a physical altercation with the other employee?

    b. Was the worker subjected to extreme verbal abuse or profanity? . . .

. . . .

> F. Supervisor. When a worker leaves his job for any reason involving his relations with a supervisor, the adjudicator will apply the same considerations that apply to relations with a fellow employee; see R6-3-50515(C).

(Internal citations omitted.)

¶20 It is clear that sexual harassment in violation of Title VII could constitute "good cause" under A.A.C. R6-3-50210 and R6-3-50515. Here, however, the ALJ found that Claimant's credibility was affected severely by self-contradictions in her testimony and by inconsistencies between her testimony and other evidence. Specifically, the ALJ noted a conflict between Claimant's testimony regarding what she was told to do with Lynn's personal e-mails and the testimony of the former employee who had trained Claimant in her job duties. It was for the ALJ to decide whether Claimant was credible, and the ALJ was free to reject her testimony for being self-contradictory or inconsistent with other evidence. *Holding v. Indus. Comm'n*, 139 Ariz. 548, 551, 679 P.2d 571, 574 (App. 1984); *see also* A.A.C. R6-3-50190(B)(2)(a) ("If a statement is denied by another party, and not supported by other evidence, it cannot be presumed to be true."). We discern no abuse of discretion in the ALJ's finding, and therefore we are bound by it.

¶21 The former employee's testimony was that at training, Claimant was not instructed to open or print any of Lynn's

personal e-mails. Instead, she was told to notify Lynn of the presence of such e-mails. Additionally, Claimant did not dispute evidence that on March 5, 2008, Suzan instructed her to not open Lynn's personal e-mails, and Claimant herself testified that Lynn gave her the same instruction on March 26, 2008. There was, therefore, sufficient evidence to support a finding that Claimant was exposed to the offensive e-mails only because she failed to follow specific, repeated directions regarding her job duties.

¶22 Had Claimant followed instructions, she reasonably could have avoided seeing the offensive content of the personal e-mails admitted into evidence at the Appeal Tribunal hearing,[8] even if she was unsure whether the senders were Lynn's personal friends, the firm's clients, or both. The subject lines of the e-mails were sufficient to put a reasonable person on notice that the e-mails were personal and not related to the business of a law firm.

¶23 It bears emphasis that this is an unemployment benefits appeal, not a civil case. Although the standard of review and narrow substantive law applicable in this case require us to affirm on this record, our decision should not be

[8] Claimant has attached to her opening brief additional e-mails that were not admitted into evidence at the hearing. We do not consider those e-mails.

interpreted to suggest that lawyers may engage in the type of conduct presented in this case without consequence. Our decision in this appeal does not reach the potential civil or professional consequences for the failure to guard against unnecessarily offensive working conditions within appellees' law firm. For example, a civil or professional tribunal may well conclude that the e-mails in the record are offensive, and that there was evidence that Lynn and Suzan were aware that Claimant was exposed to e-mails that she rightly found offensive. Such a tribunal could well conclude that the firm could and should have taken steps to eliminate the risk that Claimant would have been exposed to offensive personal e-mails -- Lynn's ability to use a smart phone for e-mail leaves little doubt that simple technological measures could have eliminated the need to expose his secretary to the pornographic materials that he repeatedly receives.

CONCLUSION

¶24 On the facts of this case, we must affirm the Appeals Board's decision that Claimant did not act as a reasonable worker and therefore did not quit with "good cause."

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
DANIEL A. BARKER, Judge