STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0211

Leslie Bjerke,
Relator,

vs.

U.S. Postal Service,
Respondent,

Department of Employment and
Economic Development,
Respondent.

Filed September 17, 2018
Affirmed
Jesson, Judge

Department of Employment and
Economic Development
File No. 35773446-3

Matthew E. Anderson, Anderson Law Group PPLC, St. Paul, Minnesota (for relator)

U.S. Postal Service, c/o U.S. Federal Employees, St. Louis, Missouri (respondent employer)

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

Considered and decided by Worke, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

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

JESSON, Judge

Relator Leslie Bjerke worked as a substitute carrier for the United States Postal Service starting in 1986. While he normally substituted for one specific route, he was asked to substitute for two additional routes in 2017 due to an employee shortage. Because of physical limitations, Bjerke stated that he could not substitute for the new routes and he signed a resignation form. He then applied for unemployment benefits. The department of employment and economic development determined Bjerke was ineligible for unemployment benefits, and an unemployment law judge affirmed, reasoning that Bjerke quit and no quit exceptions applied. On appeal, Bjerke argues that he did not voluntarily quit, and that even if he did, he quit because of a good reason caused by his employer. We affirm.

FACTS

Relator Leslie Bjerke began working for respondent United States Postal Service (USPS) in 1986 as a substitute rural carrier associate. At the time he was hired, Bjerke was informed that his job duty was to substitute on all routes as necessary. He worked approximately 90 days in a calendar year, as he would substitute for a regular carrier. The normal route Bjerke would substitute for was approximately 150 miles on dirt country roads, with approximately 235 mail boxes. There were two other routes that Bjerke could potentially substitute for: one was a city route approximately 60 miles long and the other was considered the most difficult of the three as it was an out-of-town route with a large amount of deliveries.

By May 2017, Bjerke was the only substitute carrier left in his office, as the others had either quit or been reassigned. Bjerke's supervising postmaster informed him that he had to substitute for two new routes until replacements were hired. He had subbed for those two routes in the past, most recently around Christmas. Bjerke opposed subbing for all three routes, as he later explained:

> I didn't feel that I could handle it and learn two routes all over again and have three routes to do with, I don't know, probably 1500 mail boxes between the three routes. I'm just guessing at that number but, I've, being 76 years old and a disabled vet, I figured it was just a little beyond my capability anymore. It's a job for a 30 year old, not a 76 year old guy.

Throughout his employment, Bjerke worked "basically" the same schedule, but adding two new routes would also mean that he would have to work a new schedule and additional hours. Bjerke expressed his concerns to the supervising postmaster, who stated that she understood. But Bjerke did not request any accommodations. The supervisor then told Bjerke that he had three options: (1) stay employed and substitute for all three routes; (2) quit; or (3) resign. Bjerke chose to resign and completed a resignation form.

In July 2017, Bjerke applied for unemployment compensation, stating that he "was told by the employer to quit or resign" and that he resigned because he "was physically unable to perform the added daily duties being assigned." In August 2017, he was determined ineligible to receive unemployment benefits because he quit his employment. Later that month, Bjerke appealed the determination, and a hearing occurred in October 2017.

At the hearing, both Bjerke and his supervising postmaster testified. Bjerke focused his testimony on the fact that he was told to quit or resign. He also mentioned that he may have been forced out due to age discrimination. Furthermore, he explained that he could not handle the additional routes due to his physical state and that his supervising postmaster should have been aware of his ailments. But Bjerke acknowledged that he did not request an accommodation. The supervising postmaster also testified, and confirmed that she gave Bjerke three options regarding the new routes: (1) stay employed and fill in the new routes; (2) quit; or (3) resign. She stated that Bjerke responded that he physically could not do it, and she gave him the resignation form and told him, "it's your choice to fill that out." The supervisor denied knowing about medical conditions that would prevent Bjerke from working, and denied any knowledge of age discrimination.

The unemployment-law judge (ULJ) determined that Bjerke voluntarily quit his employment because he was not willing to substitute for all three routes. The ULJ further determined that the quit-for-good-reason-caused-by-employer and the quit-when-medically-necessary exceptions did not apply. Bjerke requested reconsideration, and attached medical records highlighting his ankle injury. In its reconsideration, the ULJ found credible Bjerke's testimony that he could not substitute for all three routes due to age and physical limitations, but concluded that the quit-when-medically-necessary exception did not apply because he failed to request an accommodation. As a result, the ULJ affirmed its earlier decision.

Bjerke appeals.

D E C I S I O N

On appeal, Bjerke challenges the ULJ's determination that he voluntarily quit employment, and instead argues that he was terminated. Alternatively, Bjerke argues that, even if he did voluntarily quit, the ULJ erred when it determined the quit-for-good-reason-caused-by-employer exception did not apply. This court may reverse or modify the decision if the ULJ's findings, inferences, conclusion, or decision are "unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 268.105, subd. 7(d)(5) (Supp. 2017). Whether an individual quit her job or was terminated is a question of fact. *Lilledahl v. Process Displays Co.*, 413 N.W.2d 273, 274 (Minn. App. 1987). However, once determined that an individual quit, whether she falls within one of the exceptions to ineligibility is a question of law reviewed de novo. *See Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000).

To address these issues, we first examine the threshold issue of whether he voluntarily quit employment, and then we determine if any of the quit exceptions apply.

I. Bjerke quit employment.

The threshold issue in this matter is whether Bjerke voluntarily quit his job or was terminated.[1] Generally, an applicant who quits employment is ineligible for unemployment compensation unless they fall within a statutory exception. Minn. Stat. § 268.095 (Supp.

[1] Bjerke also contends, in the alternative, that he was constructively discharged. However, the unemployment-compensation statute explicitly prohibits this argument. *See* Minn. Stat. § 268.095, subd. 2(b) (Supp. 2017) ("When determining if an applicant quit, the theory of a constructive quit does not apply.").

2017). Quit is defined as occurring "when the decision to end the employment was, at the time the employment ended, the employee's." Minn. Stat. § 268.095, subd. 2(a).

Here, the facts surrounding the end of Bjerke's employment are not in dispute and substantially support the ULJ's determination that it was Bjerke's decision to end employment. An ultimatum was given: Bjerke had to decide between staying employed and performing job duties or quitting. He chose to quit instead of substituting for the two additional routes because he believed he was physically unable to add additional routes. Furthermore, "[a]n employee who has been notified that the employee will be discharged in the future, who chooses to end the employment while employment in any capacity is still available, has quit the employment." Minn. Stat. § 268.095, subd. 2(c). Here, Bjerke had "employment in any capacity," as he had the option to substitute for all three routes. While employees may have good reasons to quit, some of which enable them to receive unemployment compensation, that is an issue for whether a quit exception applies—not whether a quit occurred.

Bjerke counters that a "voluntariness" test suggests a different result. This voluntariness test refers to whether an employee exercised a free-will choice and control in the matter. *Lewis v. Minneapolis Moline, Inc.*, 288 Minn. 432, 438, 181 N.W.2d 701, 705 (1970). But the current unemployment-benefits statute does not contain a voluntariness test; rather, it states that an "applicant who quit employment is ineligible for all unemployment benefits" barring an applicable exception. Minn. Stat. § 268.095, subd. 1. We further note that this "voluntariness" test is no longer used in recent caselaw.

As a result, we follow the statutory language without factoring "voluntariness" into our analysis. We therefore affirm the ULJ's finding that Bjerke quit employment.[2]

II. None of the quit exceptions apply to Bjerke.

Bjerke argues in the alternative that should this court determine he quit, the good-reason-caused-by-employer exception should apply.[3] Individuals who quit employment are generally ineligible to receive unemployment compensation unless they fall within a statutory exception. Minn. Stat. § 268.095, subd. 1. Applicants who quit because of a good reason caused by the employer are not prohibited from receiving unemployment compensation. Minn. Stat. § 268.095, 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.

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[2] Bjerke also argues that he did not quit because USPS knew or should have known that asking him to substitute for two new routes would force him to quit. This argument does not factor into the analysis of whether he quit, and is better addressed in whether Bjerke had a good reason to quit caused by his employer.

[3] While Bjerke does not address this exception on appeal, we note that individuals who quit because of a serious illness or injury can be eligible for unemployment compensation. *See* Minn. Stat. § 268.095, subd. 1(7). But this exception only applies "if the applicant informs the employer of the medical problem and requests accommodation and no reasonable accommodation is made available." *Id.* While it is not required that the employee formally request an accommodation in writing, and other circumstances putting the employer on notice can potentially be sufficient, here Bjerke explicitly testified he did not request an accommodation as he felt it would be futile. *See Madsen v. Adam Corp.*, 647 N.W.2d 35, 39 (Minn. App. 2002) (determining that the burden to request an accommodation was satisfied when the employee discussed potential accommodations with her employer for her serious medical issue, despite the lack of a formal written request). Because Bjerke concedes that he did not request an accommodation, this exception does not apply.

Minn. Stat. § 268.095, subd. 3(a). For an employer to cause an employee to quit, "there must be some compulsion produced by extraneous and necessitous circumstances." *Werner v. Med. Prof'ls LLC*, 782 N.W.2d 840, 843 (Minn. App. 2010) (quotations omitted), *review denied* (Minn. Aug. 10, 2010).

Bjerke contends that two independent reasons constitute good reasons caused by his employer: (1) drastic change in employment terms; and (2) disability and age discrimination. We address each reason in turn.

Drastic change in employment terms

Bjerke contends that his employment terms would have drastically changed in two ways if he started substituting for all three routes: (1) an increase in hours, in addition to having to work more weekdays; and (2) having to work a significantly more difficult route that he was unaccustomed to. He argues that these changes constitute a good reason to quit caused by the employer. We disagree.

Bjerke first argues that his employment terms drastically changed because he would have had to work more hours each week, along with more weekdays. This court has found that a change in wages, hours, or schedules can constitute good reasons to quit. *See Danielson Mobil, Inc. v. Johnson*, 394 N.W.2d 251, 253 (Minn. App. 1986) (determining a 19% reduction in wages is a "good cause" to quit); *Rootes v. Wal-Mart Assocs., Inc.*, 669 N.W.2d 416, 419 (Minn. App. 2003) (determining that a decrease in hours and wages constituted a good reason to quit); *Krantz v. Loxtercamp Transp., Inc.*, 410 N.W.2d 24, 27 (Minn. App. 1987) (determining that an employer changing a worker's schedule and

requesting that he work weekends, when the employee was told he would have weekends free, constituted a good reason to quit).

Here, however, Bjerke's increase in hours and weekday shifts is inherent in his job as a substitute carrier. Bjerke's job duty was to substitute for routes as needed, which meant his hours and schedule would necessarily fluctuate throughout the year. While a similar increase in hours, or change in shift, for a non-substitute position could potentially establish a drastic change in employment constituting a good reason to quit caused by the employer, that is not the case here.

Bjerke also argues that working additional and more difficult routes that were outside his normally scheduled route constitutes a drastic change in employment terms. We are not persuaded. While the ULJ focused on the fact that USPS informed Bjerke when it hired him that it was his duty to substitute for any route as necessary, we do not find it necessary to look nearly 30 years in the past to ascertain job duties. More important than what USPS stated his job duties were, testimony at the hearing established that Bjerke substituted for the additional routes in the past few years, including over the holidays. And because Bjerke substituted for the additional routes in the recent past, USPS requesting him to again substitute for them does not serve as a drastic change in employment terms.

Disability and age discrimination

Bjerke also contends that disability and age discrimination were present and both constituted good reasons to quit caused by the employer. Courts have previously determined that discrimination can constitute a good reason to quit caused by employer. *See Marz v. Dep't of Emp't Servs.*, 256 N.W.2d 287, 289 (Minn. 1977). ("The burden then

shifts to the employee to show good cause attributable to the employer for leaving the employment. Racial discrimination is such a cause.").

Here, no evidence of disability or age discrimination exists to warrant the exception applying. At the hearing, Bjerke mentioned he believed he was discriminated against because of his age, but the only reason he put forth was because he was in his 70s. And regarding disability discrimination, he mentioned past injuries that cause him current disabilities. While these facts may show he was in a protected class, they fail to show any discrimination on the part of USPS. And Bjerke testified that he believed his supervisor treated him fairly. Because there is no evidence of discrimination on the part of his employer, we determine this does not constitute a good reason for Bjerke to quit caused by the employer.

Bjerke argues that giving "an old, limping, injured man an impossible ultimatum" constitutes discrimination. We disagree. Bjerke was only asked to do job assignments that were part of his job duties. While we do not disagree that he may have had physical limitations that prevented him from doing the routes, merely asking him to perform a job duty does not constitute discrimination. This is especially true in light of a reasonable explanation as to why he was the one asked to substitute for the two additional routes—Bjerke was the only substitute carrier at his work location. Because there is not any evidence that Bjerke was discriminated against, we affirm the ULJ's determination that the good-reason-caused-by-employer exception does not apply.

Affirmed.