STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1216

James Plank, Relator,

vs.

Aubrey, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed April 26, 2011
Affirmed
Shumaker, Judge

Department of Employment and Economic Development
File No. 24821368-3

James Plank, New Brighton, Minnesota (pro se relator)

Aubrey, Inc., Carlsbad, California (respondent employer)

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

Considered and decided by Halbrooks, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

SHUMAKER, Judge

Relator James Plank challenges the decision of the unemployment-law judge (ULJ) that he is ineligible for unemployment-compensation benefits, contending that he

was compelled to "resign" from his employment and, therefore, did not "quit" his job. The ULJ concluded that relator quit employment and that no exception applied to make him eligible for benefits. We affirm.

FACTS

Relator James Plank appeals the ULJ's determination that he quit employment with Aubrey, Inc., a direct competitor of his former employer, Brennen Medical. Plank worked for Brennen Medical from June 2002 until his employment was terminated on December 21, 2009. He began working for Aubrey, Inc. on January 4, 2010, in California. On February 19, 2010, Brennen Medical sued Plank for an alleged violation of non-competition and non-disclosure agreements while he worked for Aubrey, Inc.

When Plank informed Aubrey, Inc. executives that Brennen Medical was suing him, they told Plank that the company "would be supportive and help in any way" and suggested he "get legal counsel to help in this matter." On March 12, 2010, after having met with counsel, Plank and Aubrey, Inc. executives mutually decided that he should resign rather than engage in protracted litigation with Brennen Medical. Aubrey, Inc. contends that Plank's decision to resign was "[d]ue to location of [Aubrey] in California and allegations made by Brennen Medical," and that "it was in best interest to separate." Brennen Medical then dismissed its suit against Plank.

Plank alleges that he did not quit employment with Aubrey, Inc., but that his decision to end his employment was a "mutually agreed upon resignation." He contends that he felt compelled to resign because of Brennen Medical's litigation and the logistical

and personal complications he would suffer as a result of concurrent litigation and employment with Aubrey, Inc. Aubrey, Inc. corroborates Plank's version of facts.

After leaving his employment with Aubrey, Inc., Plank applied for unemployment-compensation benefits with the Department of Employment and Economic Development (DEED). DEED determined that he was ineligible for benefits and he appealed. After an evidentiary hearing, a ULJ concluded that he voluntarily quit employment, affirming DEED's ineligibility determination. The ULJ concluded that Plank quit employment but that it was not for a good reason caused by his employer. In his request for reconsideration, Plank stated simply that he "was terminated from Brennen Medical." Concluding that Plank's termination of employment from Brennen Medical was irrelevant to the issue of whether he quit employment with Aubrey, Inc., the ULJ affirmed the decision. Plank's certiorari appeal followed.

D E C I S I O N

Standard of Review

This court may reverse or modify the ULJ's decision if it is affected by error of law, is unsupported by substantial evidence, or is arbitrary or capricious. Minn. Stat. § 268.105, subd. 7(d)(4)-(6) (2010). This court reviews the ULJ's findings of fact "in the light most favorable to the decision" and defers to the ULJ's credibility determinations. *Skarhus v. Davanni's Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006).

Did Plank Quit?

A person who quits employment is ineligible for unemployment benefits, absent a statutory exception. Minn. Stat. § 268.095, subd. 1 (Supp. 2009). The ULJ found

Plank's resignation to be clear evidence that he quit employment and proceeded to the next step, which was to determine whether there was an exception to Plank's decision to quit. The ULJ deemed that the most relevant statutorily provided exception was quitting for a good reason caused by an employer. *See id.* subd. 1(1).

Quit for a Good Reason Caused by Employer

The ULJ concluded that Plank quit employment but that it was not for a good reason caused by his employer. "The determination that an employee quit without good reason attributable to the employer is a legal conclusion." *Nichols v. Reliant Eng'g & Mfg., Inc.*, 720 N.W.2d 590, 594 (Minn. App. 2006). This court reviews questions of law de novo. *Johnson v. Walch & Walch, Inc.*, 696 N.W.2d 799, 800 (Minn. App. 2005), *review denied* (Minn. July 19, 2005).

> A good reason caused by the employer for quitting 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.

Minn. Stat. § 268.095, subd. 3(a) (2010). It is undisputed that Plank's resignation was not the result of conduct by Aubrey, Inc., but was a result of Brennen Medical's litigation against him and the resulting personal ramifications. Plank has not argued that Aubrey, Inc. asked or even suggested that he resign from employment. So the ULJ's conclusion that Plank did not quit employment for a good reason caused by his employer was supported by the undisputed evidence.

Quit or Resignation

The dispositive issue is whether Plank actually "quit" employment as defined by Minnesota unemployment law. Plank contends that the ULJ erred in concluding that he quit. The question of 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). This court reviews questions of fact in the light most favorable to the decision and will affirm a finding if it is supported by substantial evidence. *Skarhus*, 721 N.W.2d at 344.

"A quit from employment 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. 2009). Plank testified at his hearing that "it was not my personal choice [to resign from Aubrey, Inc.]" He testified that, because of the potential for protracted and expensive litigation with Brennen Medical, and because of the thought of juggling litigation, travel expenses to Minnesota for the suit, and work in California, "I thought the only thing I could do that was right for Aubrey, Inc. and for my family and for myself was to resign from that position." He testified that Brennen Medical is "responsible for my unemployment."

"An employee . . . who chooses to end the employment while employment in any capacity is still available, is considered to have quit the employment." Minn. Stat. § 268.095, subd. 2(b) (Supp. 2009). Plank does not argue that Aubrey, Inc. intended or even suggested that he would be discharged from employment because of Brennen Medical's litigation. The evidence shows that Plank could have remained in Aubrey Inc.'s employ, and that the only reason his employment ended was that he decided to

leave. Steven Moss, who represented Aubrey, Inc. at Plank's hearing and was a former colleague of Plank's, testified that

> part of [Plank's] decision [to resign] was that he did not want [Aubrey, Inc.] to get pulled into the cost of litigation . . . . So he saved [Aubrey, Inc.] a lot of time and effort having to deal with interrogatories and with revealing information . . . to [Brennen Medical] and their attorneys. So I'd just like to reiterate it's not [Plank's] choice to be unemployed.

Moss corroborated Plank's testimony that Plank did not want to resign but felt compelled to do so. However, Moss's testimony supports the conclusion that Plank, rather than Aubrey, Inc., decided to terminate his employment.

"A quit from employment 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. 2009). "The question of whether an employee has been voluntarily or involuntarily terminated is a question of fact." *Larson v. Pelican Lake Nursing Home*, 353 N.W.2d 647, 648 (Minn. App. 1984). It is determined "not by the immediate cause or motive for the act but by whether the employee directly or indirectly exercised a free-will choice and control as to the performance or nonperformance of the act." *Anson v. Fisher Amusement Corp.*, 254 Minn. 93, 98, 93 N.W.2d 815, 819 (1958). Moss testified that if Brennen Medical had not sued Plank, "[he would] still be here and thriving." Plank clearly could have remained employed with Aubrey, Inc., had he chosen to do so.

Plank also makes a distinction between quitting and resigning. He alleges that "resignation" affords him protection while a "quit" does not. But he has offered no authority to support that proposition and we have found none.

Constructive Discharge

Constructive discharge can also be an exception to the rule of ineligibility for an employee who leaves his employment. Minn. Stat. § 268.095, subd. 4 (2010). Plank in effect contends that he was constructively discharged from employment because he was compelled to resign. 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 (2010). Plank does not contend that Aubrey, Inc. acted in a way that made him believe he would no longer be employed. He was never told that he would be laid off or fired, and he does not allege that Aubrey, Inc. was the cause of his resignation. There is no evidence that Plank was constructively discharged from employment.

The record supports the ULJ's determination that no exception exists qualifying Plank for unemployment-compensation benefits.

Request for Reconsideration

In his request for reconsideration, Plank states only that he "was terminated from Brennen Medical . . . on [December 21, 2009] after 89 months of consecutive employment in the state of Minnesota." It is unclear whether Plank intended the request for reconsideration to state a claim for unemployment-compensation benefits as a result of Brennen Medical's termination of his employment or whether he intended to augment his appeal of the determination that he quit employment with Aubrey, Inc. Consequently, the ULJ stated on reconsideration that:

> Plank requests reconsideration arguing that he was terminated from employment by another employer on December 21, 2009. The decision does not concern that separation from employment. The decision concerns Plank's quit of employment with Aubrey, Inc. on March 12, 2010. The decision on Plank's appeal is factually and legally correct.

A relator may file a request for reconsideration, but it must be relevant to the ULJ's decision on the case. *See* Minn. Stat. 268.105, subd. 2(a) (Supp. 2009). Plank's request for reconsideration does not involve this case but raises an additional issue relating to a former employer, who was not a party to Plank's unemployment-benefits case and who did not participate in Plank's hearing. As such, the issue Plank raised in his request for reconsideration is irrelevant to these proceedings and was properly denied.

Unfair Conclusion

Plank contends that the ULJ did not use the preponderance-of-the-evidence standard in determining the issues of fact in the case. "All issues of fact under the Minnesota Unemployment Insurance Law are determined by a preponderance of the evidence." Minn. Stat. § 268.031, subd. 1 (Supp. 2009). The ULJ explained at the beginning of the hearing that the facts were to be determined by a preponderance of the evidence, and defined that term to mean "the evidence supports that these facts are more likely true than not." Other than Plank disagreeing with the ULJ's conclusion that he quit, rather than resigned, Plank offers no factual basis for contending that the ULJ did not analyze the facts under this standard. The ULJ's decision is supported by a preponderance of the evidence in the record and was not arbitrary or capricious.

Plank also contends that the ULJ too broadly construed Minnesota unemployment law in denying him benefits, in contravention to the mandate of Minn. Stat. § 268.031, subd. 2 (Supp. 2009), which states that:

> [t]his chapter is remedial in nature and must be applied in favor of awarding unemployment benefits . . . . In determining eligibility or ineligibility for benefits, any statutory provision that would preclude an applicant from receiving benefits must be narrowly construed.

Other than his disagreement with the ULJ's conclusion that he quit, he offers no basis for contending that the ULJ construed Minnesota unemployment law impermissibly broadly. "There is no presumption of entitlement or nonentitlement to unemployment benefits." Minn. Stat. § 268.069, subd. 2 (Supp. 2009).

Affirmed.