STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2114

Chrystal Nelson,
Relator,

vs.

Pinnacle Engineering Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

Filed August 24, 2010
Affirmed
Shumaker, Judge

Department of Employment and Economic Development
File No. 22868432-3

Peter J. Nickitas, Peter J. Nickitas Law Office, LLC, Minneapolis, Minnesota (for relator)

Thomas A. Harder, Stephen L. Wilson, Foley & Mansfield, PLLP, Minneapolis, Minnesota (for respondent employer)

Lee B. Nelson, Amy R. Lawler, St. Paul, Minnesota (for respondent department)

Considered and decided by Shumaker, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

SHUMAKER, Judge

Relator challenges the decision of an unemployment-law judge (ULJ) that relator was not eligible for unemployment benefits because she quit her job without a good reason attributable to her employer. She argues that she had good reason to quit because (1) her employer violated the Minnesota Parenting Leave Act when it reduced her salary upon her return from maternity leave, and (2) she had good reason to quit because of sexual and racial harassment and retaliation. We affirm.

FACTS

Relator Chrystal Nelson began working for Pinnacle Engineering, Inc. on March 16, 2005, as a full-time, salaried human-resources representative. Nelson went on approved maternity leave from April 9, 2009, through May 26, 2009. Prior to going on maternity leave, Nelson's regular work schedule was from 8:00 a.m. to 5:00 p.m. Monday through Friday, for which she was paid an annual salary of $43,000. Within that schedule, Nelson received two breaks of five to ten minutes each throughout the day and a one-hour lunch break.

Nelson complains of specific incidents that created a hostile work environment prior to her going on maternity leave. In 2007, Jim Holland, Pinnacle's CEO, sent out an e-mail indicating that employees would receive a monetary award for recruiting people to fill openings at Pinnacle, and which highlighted several technical positions. Nelson recruited her sister, Amber Johnston, for Pinnacle, and in January 2009, Johnston was hired as the full-time receptionist. Nelson was not given a bonus and, when she

complained, her supervisor, Jay Allsup, investigated and learned that the bonus was limited to referrals for technical positions.

Nelson also believed that during her last year of employment her relationship with Holland deteriorated and attributed it to his disapproval of her fiancé, who is African American. On two occasions in January 2009, Nelson overheard Holland make inappropriate comments about President Obama; once referring to him using profanity and a racial epithet, and once, when giving a rifle to an employee, saying that it was a "gift for you for all the Obama people outside." Nelson was not Holland's intended audience of these remarks, and although she was offended, Nelson did not address her concerns about the remarks with management.

Before Nelson returned to work from maternity leave, she requested accommodations so that she could express milk during the day. Nelson told Allsup that it would take her up to 20 minutes each time she expressed milk, approximately three times each day. Nelson told Allsup that she would be unable to expand her work hours to accommodate these periods. Accordingly, Pinnacle reduced her salary by 12.5% to reflect a 35-hour work week, making her final salary $37,625. Although Nelson expressed concern with this reduction in pay, once Allsup explained his reasons for it, she did not complain further to him or anyone else.

Nelson was informed that she could use a vacant office to express milk. The office had a window with no curtains; so with the help of other employees, Nelson moved a bookcase in front of the window. Nelson believed that someone was intentionally

moving the bookcase away from the window between the times she used the office during her last four days at work, but she did not complain to Allsup.

After Nelson returned from maternity leave, Allsup suggested several times that she find a closer daycare because the long commute to take her child to a relative's home (45 minutes each way) seemed to be stressful for her. On June 2, 2009, Johnston brought Nelson a pornographic e-mail that was accidentally sent to her by Holland. The e-mail was brought to Nelson because of her role in the human-resources department. When Holland was notified that he had accidentally sent the e-mail to Johnston instead of his intended recipient, he was not sympathetic or apologetic. When Nelson expressed her frustration with the situation, Allsup responded that maybe he would be better off hiring an all-male staff.

Three days later, Allsup called Nelson into his office to state his concern that she did not appear to be happy at Pinnacle. Allsup suggested that Nelson take a voluntary layoff. Nelson told him that she would think about it over the weekend. On June 8, Nelson declined the layoff. Nelson did not report for work from June 12-17, because first her child was sick, and then that she had to address her own health issues. Nelson e-mailed a letter of resignation to Allsup on June 18.

Nelson applied for unemployment benefits but was determined to be ineligible because she voluntarily quit her job. After an evidentiary hearing, the ULJ denied Nelson unemployment benefits. Nelson filed a request for reconsideration, and the decision of the ULJ was affirmed. Nelson appeals.

D E C I S I O N

This court reviews a ULJ's decision to determine whether substantial rights have been prejudiced because the findings, inferences, conclusion, or decision are affected by error of law, or unsupported by substantial evidence in view of the entire record. Minn. Stat. § 268.105, subd. 7(d) (2008). Under the unemployment-benefits statute, an employee who quits employment because of a good reason caused by the employer is eligible for benefits. Minn. Stat. § 268.095, subd. 1(1) (Supp. 2009). A good reason to quit must be 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) (2008). Further, if the applicant was subjected to such adverse working conditions by the employer, "the applicant must complain to the employer and give the employer a reasonable opportunity to correct the adverse working conditions before that may be considered a good reason caused by the employer for quitting." *Id.*, subd. 3(c) (2008).

The ULJ's determination that an employee quit without good reason is a legal conclusion, which this court reviews de novo. *Peppi v. Phyllis Wheatley Cmty. Ctr.*, 614 N.W.2d 750, 752 (Minn. App. 2000).

I.

Nelson argues that she quit her employment for good reason attributable to Pinnacle because it decreased her salary in violation of the Minnesota Parenting Leave Act. *See*

Minn. Stat. §§ 181.940-.944 (2008) (parenting leave act); *see also Polley v. Gopher Bearing Co.*, 478 N.W.2d 775, 778 (Minn. App. 1991) (holding that employee had good reason to quit caused by the employer where, upon employee's return from parenting leave, the employer assigned her to a position not comparable to her former position and reduced her hours, leading to reduction in salary, in violation of the parenting leave act), *review denied* (Minn. Jan. 30, 1992). Nelson argues that, upon an employee's return from maternity leave, that employee "is entitled to return to employment in the employee's former position or in a position of comparable duties, number of hours, and pay." *See* Minn. Stat. § 181.942, subd. 1 (2008). In addition, Minn. Stat. § 181.939 (2008) requires employers to "provide reasonable unpaid break time each day to an employee who needs to express breast milk for her infant child," which must run concurrently with already provided break times, if possible.

Upon her return from maternity leave, Nelson resumed the same position with comparable duties, but her pay was decreased to reflect the unpaid time she spent to express milk. To determine whether Nelson's salary decrease violates the parenting leave act and provides her with good reason to quit caused by her employer, it is necessary to first consider the amount of the salary decrease. "Generally, a substantial pay reduction or an unreasonable change in terms of employment gives an employee good cause for quitting." *Wood v. Menard, Inc.*, 490 N.W.2d 441, 443 (Minn. App. 1992). A 20-25% pay reduction has been considered substantial, but less than 15% is not sufficient to show good cause attributable to the employer. *Sunstar Foods, Inc. v. Uhlendorf*, 310 N.W.2d 80, 84 (Minn. 1981); *see also Polley*, 478 N.W.2d at 778 (considering 18.75 percent

reduction in hours which, even with small hourly raise, resulted in lowered earnings, along with return to position that was not comparable to previous position). Nelson's salary was cut by $5,375, or 12.5%, upon her return from maternity leave. And her position was comparable to the one she had before she left on parenting leave.

Next, the salary reduction here occurred after Nelson requested an accommodation from her employer so that she could express milk at work, as authorized by Minn. Stat. § 181.939, which she did with unpaid breaks. The ULJ found that she indicated that it would take up to twenty minutes each time she expressed milk, which would occur several times per day; that she was not available to work outside of her scheduled hours; that she also received a paid lunch hour and two paid five- to ten-minute breaks each shift; and that based on her reduced availability to work, her salary was decreased accordingly.

Nelson challenges the finding as to the length of time and asserts that Pinnacle failed to consider alternatives to unpaid break times, but these issues were the subject of testimony. Allsup testified to these facts, including that Nelson specifically told him that she could work 8 to 5, that she needed her one-hour lunch period, her breaks during each shift, and, in addition, three 20-minute sessions to express her milk. Based on these requests, Allsup calculated that she would be working 35 hours a week and adjusted her salary accordingly. Allsup testified that she never approached him again on the issue to tell him the time estimates were incorrect, and Nelson testified that after he advised her as to her post-leave pay the first week back, they never discussed it again. While Nelson asserts that she in fact spent only thirty minutes a day expressing milk and that Pinnacle did not accommodate her by incorporating these breaks into her existing paid breaks, the

ULJ's findings are supported by substantial evidence in the record. Further, as the ULJ ruled, Pinnacle was not required under the statute to provide paid breaks for expressing milk. Minn. Stat. § 181.939.

Nelson next argues that, because she is salaried, she is exempt from having her hours and pay reduced. There is no merit in this argument because her pre-leave pay was based on a 40-hour week and she chose to work fewer hours when she returned.

Finally, a good reason to quit must, in relevant part, be a reason for which the employer is responsible. Minn. Stat. § 268.095, subd. 3(a)(1). As discussed above, Nelson reduced her hours on her own accord, and Pinnacle adjusted her salary accordingly. Because Nelson and Allsup discussed Nelson's needs upon returning from parenting leave, Allsup adjusted her salary according to her changed availability. Breaks for expressing milk are statutorily unpaid, and Nelson did not relay to Allsup any ongoing dissatisfaction in the salary adjustment. The ULJ correctly ruled that Nelson did not quit for good cause attributable to Pinnacle based on a decrease in her salary.

II.

Nelson contends that she had good cause to quit attributable to Pinnacle based on sexual and racial harassment. An employee has good cause to quit a job for a reason attributable to the employer "if it results from sexual harassment of which the employer was aware, or should have been aware, and the employer failed to take timely and appropriate action." Minn. Stat. § 268.095, subd. 3(f) (2008). Sexual harassment is defined as

> unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other conduct or communication of a sexual nature when: . . . (3) the conduct or communication has the purpose or effect of substantially interfering with an applicant's work performance or creating an intimidating, hostile, or offensive working environment.

Id., subd. 3(f)(3). In addition, racial discrimination by the employer can constitute good reason to quit caused by the employer. *Marz v. Dep't of Emp't Servs.*, 256 N.W.2d 287, 289 (Minn. 1977).

Nelson asserts that "an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over a victimized employee." *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 570 (Minn. 2008); *see also Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150 (8th Cir. 2003) (upholding gender discrimination claim based on pregnancy-related discrimination). As the ULJ found, Nelson quit because she sincerely believed that she had been subjected to harassment by her supervisor Allsup and company CEO Jim Holland. But after addressing the reasons for her belief in detail, the ULJ ruled that these facts do not demonstrate that the circumstances would have caused an average, reasonable employee to quit.

Although Nelson has cited legal authority for her argument, under the facts as found by the ULJ, we agree that they do not support Nelson's claims. The pornographic e-mail that was accidentally sent by Holland was brought to Nelson because of her role in the human resources department. The highly inappropriate remarks and the use of the profanity and racial epithet that Holland made about President Obama were not directed

at Nelson and, further, they occurred approximately six months before Nelson quit her employment, so their relevancy would be questionable. *See Biegner v. Bloomington Chrysler/Plymouth, Inc.*, 426 N.W.2d 483, 486 (Minn. App. 1988) (holding that remarks that employee cited as evidence of sexual harassment that ceased three months before quit were not cause of quit under unemployment benefits statute).

Next, we review comments by Allsup that Nelson cites in support of her argument. Although it was inappropriate for Allsup to comment that perhaps he should have hired an all-male staff, this comment does not rise to the level of harassment that would cause a reasonable employee to quit. Nelson also contends that Allsup "harassed" her about the location of her daycare and her attitude. As the ULJ found, while Nelson felt that Allsup singled her out for criticism, the employer has the right to address performance issues with employees.

Nelson also relies on other acts that she asserts were discriminatory that we address briefly. While Nelson cites the fact that she did not receive a referral bonus, as the ULJ found, the employer has the right to determine which positions qualified for the referral bonus, and the mere fact that two men had previously received bonuses, neither of which were for the amount specified in the e-mail, for recruiting new technical staff, is not evidence of sex discrimination. Additionally, while Nelson believed that someone was vindictively moving the bookcase away from the window in the office she was provided to express milk during the last several days she worked, and she briefly mentioned in passing to Allsup her suspicion that the bookcase had been moved, he offered to help, but she never made any further or specific complaint to him.

Finally, while Nelson makes arguments regarding a constructive discharge, at the hearing, it was undisputed that relator quit employment, so we do not address this issue. She also refers to retaliation, but her arguments on the facts concern racial and sexual harassment, so we have limited our analysis to the latter.

In conclusion, we agree with the ULJ that the facts cited by Nelson would not have caused an average, reasonable employee to quit based on sexual or racial harassment.

Affirmed.