TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-14-00355-CV

Joanne Stone, Appellant

v.

Texas Workforce Commission and Louisiana Department of Revenue, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 200TH JUDICIAL DISTRICT
NO. D-1-GN-13–001308, HONORABLE TIM SULAK, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Joanne Stone appeals from the district court's summary judgment affirming the Texas Workforce Commission's decision denying her unemployment benefits on the ground she voluntarily resigned from her Houston-based job with the Louisiana Department of Revenue. Stone asserts she is entitled to unemployment benefits because her resignation was not voluntary, but was based on years of racial discrimination and harassment. She also claims TWC's determination amounts to ad hoc rulemaking. We will affirm the district court's judgment.

Background

The background information is taken from the Texas Workforce Commission's (TWC) unchallenged findings of facts and from the parties' summary-judgment evidence.

From July 2001 through April 6, 2012, Stone worked as a revenue tax auditor for the Louisiana Department of Revenue (LDR), a Louisiana state agency charged with, among other tasks,

collecting that state's tax revenues. In late August 2010, Stone transferred from the LDR's New Orleans office to its Houston office. Stone was given the opportunity to transfer to Houston, in part, as resolution of a grievance that she had filed against her supervisor, Vendetta Lockley, alleging that Lockley was harassing her.

Immediately before transferring to Houston, Stone filed a "Charge of Discrimination" against LDR with the Equal Employment Opportunity Commission (EEOC).[1]

While in Houston, Stone requested, and believed she should have been granted, assignment as an "out of state" auditor for LDR, a position that allows an auditor to work completely away from the office, checking in only periodically. LDR never responded to her requests for these positions, but Stone likewise never made any official complaints about her job or supervisors while in Houston either to LDR management or human resources. Stone did, however, seem to express disappointment about not being assigned an "out of state" position in a March 7, 2012 letter to her supervisor Kevin Richard asking to rescind a resignation she had tendered a week earlier:

> I . . . would like to rescind my letter of resignation . . . I just have been so emotionally upset over my work situation and chances for being able to work from home during all the week more in line as to what other auditors are doing.

Later, on March 22, 2012, Stone was reprimanded by her supervisor Elise Thomas for her "frequent, unscheduled call-in absences." In a letter memorializing a previously held meeting between Stone, Thomas, and Richard, regarding Stone's leave practices, Thomas advised Stone

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[1] *See* 29 C.F.R. § 1601.7 (2010) ("A charge that any person has engaged in or is engaging in an unlawful employment practice within the meaning of title VII . . . may be made by . . . any person claiming to be aggrieved."); *see generally id.* §§ 1601.6–.29 (2016) ("Procedures for the Prevention of Unlawful Employment Practices").

to make a better effort at scheduling her leave in advance and, relatedly, emphasized the rules requiring Stone to request leave from her supervisor at least 24 hours in advance of the leave or risk it being unapproved.

Three days after this reprimand, Stone requested, in a Sunday-night email to her supervisor Richard, "a couple hours for sick leave due to illness" for Monday morning, also explaining, "I do not know how to schedule leave in advance for illness." Richard's Monday-morning response—

> I am certain that we discussed your question on Thursday afternoon in my office with Elise [Thomas] your supervisor present. I have no problem reiterating what I said. I asked that you request leave in advance "when possible." I gave you an example of being sick at work and needing to leave immediately. I also gave you an example of a situation where emergency annual leave may be requested due to a sick child at school. These are unforeseen circumstances [that] could possible cause an unscheduled absence.
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> I have a question for you. How do you know at 10:30 at night that you will need a few hours of sick leave for the next morning? There also seems to be a pattern with you requesting leave every Monday morning. I will need a doctor's excuse for your absence this morning.

Stone replied, "My condition was worsening throughout the day so I went ahead and requested sick time. Regardless of the day or time, whenever I feel ill I request sick time." And then she resigned later that same day, in a letter addressed to Richard: "I Joanne Stone resign from my position as Revenue Tax Auditor III. I am providing a two week notice from date of this letter. My last day will be April 9, 2012."

Shortly after resigning her job, Stone filed a claim for unemployment compensation with TWC. TWC denied Stone's claim for unemployment benefits based on its determination that

Stone "voluntarily resigned without good cause connected with the work."[2] In her administrative appeal from that determination,[3] Stone argued that she had resigned because of ongoing racial discrimination against her in connection with her refused requests for "out of state" auditor positions and because of the hostile work environment created by her supervisor, whom Stone accused of repeatedly requesting corrections or changes in Stone's work, not paying attention to Stone when they were discussing work, and not evaluating her fairly. In a written decision affirming the denial of benefits, TWC's appeal tribunal disputed Stone's assertion that her resignation was based on racial discrimination, finding that—

> Despite her belief that [a] supervisor was discriminating against her, [Stone] never went back to human resources with any complaints after being transferred to Texas. [Stone] never complained to anyone in management above the particular manager she believed was discriminating against her. [Stone] thought that she had already brought problems in another state, with different management, to the employer's attention and that it would do no good to complain again, even though the employer had responded the first time by removing her from the supervisor she alleged was discriminating against her.
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> Despite the belief she was being discriminated against, the claimant was willing to continue working until she submitted her final resignation on Monday, March 26, 2012.

The appeal tribunal concluded that Stone's resignation was "voluntary without good cause connected with work under TWC administrative precedent," given that Stone "resigned when she did because of the email from the manager [Richard] on Monday, March 26, 2012." The appeal tribunal rejected

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[2] *See* Tex. Lab. Code 207.045(a) ("An individual is disqualified for benefits if the individual left the individual's last work voluntarily without good cause connected to the individual's work.").

[3] *See* 40 Tex. Admin. Code § 815.16 (2012) (Texas Workforce Comm'n, Appeals to Tribunals from Determinations).

Stone's assertion that she left for good cause—i.e., racial harassment—based on the appeal tribunal's conclusion that she had failed to give LDR an opportunity to resolve the Houston situation.[4]

While her claim with TWC was pending, Stone received a "Dismissal and Notice of Rights" from the EEOC in September 2012—commonly referred to as a "right-to-sue" letter—related to her EEOC charge filed in 2010. Stone filed a federal Title VII complaint against LDR in Louisiana Federal District Court in December 2012.

Meanwhile, after exhausting her administrative remedies before TWC,[5] Stone filed the instant suit against TWC and LDR, seeking judicial review of TWC's decision by "trial de novo based on the substantial evidence rule."[6] This standard of review requires a trial court to determine whether there is substantial evidence to support TWC's ruling by examining the evidence presented in trial, not the record created by the agency.[7] Here, TWC and LDR filed a joint motion for summary judgment, urging that substantial evidence supported TWC's decision to deny the benefits. The district court granted their summary judgment, which Stone now appeals.

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[4] *See, e.g.*, *McCrory v. Henderson*, 431 S.W.3d 140, 144 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Lopez v. Texas Workforce Comm'n*, No. 01-10-00849-CV, 2012 WL 4465197 (Tex. App.—Houston [1st Dist.] Sep. 27, 2012, no pet.) (mem. op.); *see also Texas Workforce Comm'n Appeals Policy & Precedent Manual* §§ 515.05–.15 ("Voluntary Leaving, Working Conditions," adopting Appeal No. 3613-CA-76 ("A claimant who quits work because of some dissatisfaction with working conditions without affording the employer any opportunity to resolve the situation thereby voluntarily quits without good cause connected with the work.")).

[5] *See* 40 Tex. Admin. Code § 815.17 (2012) (Texas Workforce Commission, Appeals to the Commission from Decisions).

[6] Tex. Lab. Code § 212.202; *see id.* § 212.201 (providing that party "aggrieved by a final decision" of TWC may obtain judicial review of that decision).

[7] *Mercer v. Ross*, 701 S.W.2d 830, 831 (Tex. 1986).

Analysis

Stone challenges the district court's summary judgment in three issues on appeal. First, Stone asserts that, in light of its finding that she had filed an EEOC charge against LDR before transferring to Houston, it was arbitrary for TWC to require her to report discrimination to LDR human resources against after she was in Houston. Second, Stone maintains that it was likewise arbitrary, in light of that same EEOC-charge finding, for TWC to conclude that Stone had failed to afford LDR an opportunity to remedy her discrimination complaint. As her third issue, Stone maintains that TWC's determination that Stone was required to re-report discrimination while she was in Houston, despite the fact that she had a pending EEOC charge against LDR constitutes ad hoc rulemaking in violation of the Administrative Procedure Act.

Standard of review

We review summary-judgment rulings de novo.[8] Summary judgment is proper if the movant establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.[9] TWC's grounds for summary judgment—i.e., that TWC's order denying Stone benefits is supported by substantial evidence—is itself a question of law.[10]

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[8] *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

[9] *See* Tex. R. Civ. P. 166a.

[10] *See Bloch v. SAVR Commc'ns, Inc.*, No. 03-12-00183-CV, 2014 WL 1203197, at *3 n.22 (Tex. App.—Austin Mar. 19, 2014, pet. denied) (mem. op.) (citing *Collingsworth Gen. Hosp. v. Hunnicutt.*, 988 S.W.2d 706, 708 (Tex. 1998)); *see also Texas Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex. 2006) ("[W]hether there is substantial evidence to support an administrative decision is a question of law.").

On review, TWC's ruling carries a presumption of validity, and the party seeking to set aside TWC's decision—here, Stone—has the burden to show that it was not supported by substantial evidence.[11] Under the substantial-evidence standard of review, the issue is whether the evidence introduced before the trial court shows facts in existence at the time of TWC's decision that reasonably support the decision. The reviewing court may not set aside TWC's decision merely because it would reach a different conclusion, but only where it determines that TWC's decision was made without regard to the law or the facts and therefore was unreasonable, arbitrary, or capricious.[12]

In the context of summary-judgment procedure, these characteristics of substantial-evidence-de-novo review effectively shift the normal burdens. To obtain summary judgment affirming its decision, TWC need only present more than a scintilla of evidence that would reasonably support that decision, while Stone must conclusively negate the existence of any such facts either to obtain or even resist summary judgment.[13] And, because both the propriety of summary judgment and the existence of substantial evidence are questions of law, we owe no deference to the district court's decision.[14]

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[11] *Collingsworth*, 988 S.W.2d at 708 (citing *Mercer*, 701 S.W.2d at 831).

[12] *Id.*

[13] *See Bloch*, 2014 WL 1203197, at *3 n.22 (citing *Collingsworth*, 988 S.W.2d at 708; *JMJ Acquisitions Mgmt., LLC v. Peterson*, 407 S.W.3d 371, 374–76 (Tex. App.—Dallas 2013, no pet.); *Texas Workforce Comm'n v. City of Houston*, 274 S.W.3d 263, 266–67 (Tex. App.—Houston [1st Dist.] 2008, no pet)).

[14] *Id.* (citing *Blanchard v. Brazos Forest Prods., L.P.*, 353 S.W.3d 569, 573–74 (Tex. App.—Fort Worth 2011, pet. denied); *Uranga v. Texas Workforce Comm'n*, 319 S.W.3d 787, 790 (Tex. App.—El Paso 2010, no pet.) (citing *Valence*, 164 S.W.3d at 661)).

Applicable law

A person who leaves her last work "voluntarily without good cause connected with the individual's work" is disqualified from receiving unemployment benefits.[15] TWC has defined "good cause connected with the work" as "such cause, related to the work, as would cause a person who was genuinely interested in retaining work to nevertheless leave the job."[16] And relevant here, TWC precedent provides that an employee who voluntarily leaves her employment because of dissatisfaction with working conditions without "affording the employer any opportunity to resolve the situation" has not quit for good cause.[17]

Arbitrariness

Relying principally on *McCrory*, *Lopez*, and the TWC precedent described above, Stone contends that, in light of TWC's finding that she had filed an EEOC charge before transferring to Houston, it was arbitrary for TWC to require her to re-report discrimination to LDR management or human resources in Houston and likewise arbitrary for it to conclude that she had failed to afford LDR an opportunity to resolve the discrimination. Noting that neither the statute, TWC rules, nor the cases that have examined this issue have required any particular form of reporting or resolution

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[15] *See* Tex. Lab. Code § 207.045.

[16] *See Lopez*, 2012 WL 4465197, at *2, 5 (quoting *Texas Workforce Commission Appeals Policy & Precedent Manual*, § 210.00 (defining "good cause)).

[17] *See id.* (concluding summary-judgment evidence demonstrated that substantial evidence supported TWC's determination that employee did not have good cause connected to her work for voluntarily leaving her employment, based upon TWC's definition of "good cause" and exceptions thereto); *see also McCrory*, 431 S.W.3d at 145 (holding that summary-judgment evidence shows that substantial evidence supports TWC's decision that employee had good cause connected with work for voluntarily leaving).

opportunity, Stone asserts that her 2010 EEOC charge indisputably made LDR aware of the discriminatory practices and afforded it the opportunity to resolve those issues. We disagree.

While it is true that TWC found that Stone filed an EEOC claim against LDR "[r]ight before leaving Louisiana" to transfer to Houston, the EEOC charge itself is not part of the summary-judgment evidence in the record before us. In fact, the only information regarding the 2010 EEOC charge that can be found in the summary-judgment evidence is in a November 16, 2010 letter from EEOC to Stone notifying her that her charge had been selected for mediation (accompanied by an agreement to mediate); a September 2012 "Dismissal and Notice of Rights" (i.e., right-to-sue letter), which merely notified Stone that the EEOC had been unable to determine that any statutes had been violated and that Stone had 90 days to sue; and the first page of Stone's federal Title VII complaint in the federal district court.[18] None of these documents, however, evidence the contents of her 2010 EEOC charge or even suggest the basis or context for the charges in it. To that extent, the evidence before us supports only TWC's limited finding here—i.e., that Stone filed an EEOC charge before transferring to Houston. It certainly does not conclusively establish, as Stone would need to do to be successful in precluding summary judgment,[19] that her 2010 EEOC charge either contained allegations of an ongoing nature or otherwise included information sufficient to notify LDR of and afford it the opportunity to resolve the discrimination problems Stone alleges she faced in Houston.

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[18] Although the contents of her federal complaint purport to be based on the 2010 EEOC charge, the complaint is incomplete and unsworn. As such, it can only be evidence of the fact that Stone filed the federal complaint.

[19] *See Bloch*, 2014 WL 1203197, at *3 n.22 (citing *Collingsworth*, 988 S.W.2d at 708).

Under the record before us—which also included appellants' summary-judgment evidence establishing that Stone did not make any complaints in Houston and supporting TWC's determination that she resigned because of the leave issue—it was reasonable for TWC to find that Stone made the EEOC charge, but ultimately determine that Stone had not provided LDR the notice and opportunity to resolve Stone's discrimination issues as required by its own legal precedent, and to conclude, therefore, that her resignation was not voluntary with good cause related to her work. We hold that TWC made its determination here with regard to both the law and facts and, therefore, did not act unreasonably, arbitrarily, or capriciously.

We overrule Stone's first and second issues.

Ad hoc rulemaking

In her final issue, Stone maintains that TWC's determination here constitutes improper ad hoc rulemaking because TWC now requires unemployment-benefits claimants who "have made formal EEOC complaints for discrimination [to] periodically 'go back' to 'management' with their complaints, even when it is the employer's policy to offer the EEOC process as an alternative remedy." We disagree.

"An ad hoc rule is a general statement of law or policy that is made in the context of a contested case and the impact of which will extend to persons beyond those who are parties to the proceeding at hand."[20] Although made in the context of a contested case, TWC's determination here cannot be said to be a general statement of law or policy regarding EEOC challenges. As we

[20] *Texas State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 535–36 (Tex. App.—Austin 2014, pet. denied as improvidently granted).

explained above, there is no basis on the record here to make any conclusions regarding the basis or content of Stone's EEOC charge against LDR. To that extent, it is simply not possible to construe any sort of TWC policy regarding the filing of EEOC charges. Further, TWC's decision here does not, contrary to Stone's assertion, require unemployment-benefits claimants who have made formal EEOC discrimination complaints to periodically update their employers regarding those complaints. Rather, TWC determined that Stone was not entitled to unemployment benefits because it found that she resigned after receiving an email from her supervisor complaining about her leave practices. It disagreed with Stone's contention that she had resigned because of discriminatory practices by her employer based on several of its findings, including that she had not complained to her employer about those practices. Although TWC also found that Stone had filed an EEOC charge in 2010, TWC did not specify the content or scope of that charge, and nothing in its decision supports Stone's assertion that the EEOC charge was considered in the context of giving LDR notice or affording LDR the opportunity to resolve the situation, nor did TWC assert that such a charge could never be notice or provide an opportunity to resolve a situation. There is simply not enough information or discussion about the EEOC charge to have such an effect. In other words, TWC's determination here regarding Stone's EEOC charge, or EEOC charges generally, does not affect the public at large, but instead is a determination of the effect, or non-effect, of Stone's EEOC charge in connection with assertion that her resignation was voluntary—i.e., it is merely an adjudication of Stone's unemployment-benefits claim applicable to Stone alone.

We overrule Stone's third issue.

Conclusion

Having overruled each of Stone's issues, we affirm the district court's judgment.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

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