STATE OF

COURT OF APPEALS

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MAR 19 1986

MARY L. LUKE,

Plaintiff,

v NO. 81157

JEMCO, INC.,

Defendant-Appellant,

and

MESC, Defendant-Appellee.

/

Before: R.M. Maher, P.J., and M.J. Kelly and H.W. Moes*, JJ.

Per Curiam

Defendant appeals as of right from an order of the circuit court which affirmed a decision of the Michigan Employment Security Commission awarding plaintiff unemployment compensation benefits. The commission had initially determined that plaintiff voluntarily left her employment without good cause attributable to her employer, and was thus subject to the disqualification sanctions of MCL 421.29(1)(a) and (3); MSA 17.531(1)(a) and (3). Plaintiff appealed, however, and following hearings before a referee pursuant to MCL 421.33; MSA 17.535, the commission concluded that plaintiff's reasons for leaving her job constituted good cause attributable to the employer and she was thus not subjected to any disqualification period. The circuit court affirmed the commission's decision pursuant to its appellate authority under MCL 421.38; MSA 17.540. We now affirm the circuit court.

Plaintiff commenced her employment with defendant as a machine operator in 1977 and voluntarily left her job on March 26, 1980. On that day, defendant's owner, president and plant manager, Herbert Johnson, observed plaintiff conversing with another employee and ordered her to cease conspiring and

*Circuit Court Judge, sitting on the Court of Appeals by assignment.

"fabricating" with other employees and return to work. Plaintiff objected to Mr. Johnson's remarks and quit. At the hearings, plaintiff explained that Mr. Johnson's behavior on March 26, 1980 culminated a series of objectionable actions on his part, including various forms of sexual harrassment, and that the March incident finally prompted her to quit.[1]

The referee heard arguments and testimony from both parties at hearings conducted over the course of several days at the conclusion of which, he found as follows:

"It does appear that claimant, Mary Luke, was unfairly criticised for allegedly falsely conspiring on her last day of work. This single incident, however, would fall far short of good cause in itself. However, the Referee finds substance to claimant Luke's charges of sexual harassment.

"By all accounts claimant Luke did not engage in anywhere near the magnitude of casual sexual banter as the other claimants. Claimant admitted she might have told a few 'cute stories'. She may have engaged in banter about the 'Jemco shower'.

"The Jemco shower was apparently an offer made in jest to take a person of the other sex for a sensuous shower in the basement.

"While the other claimants had infrequent contact with Mr. Johnson, it appears that claimant Luke had a much closer relation with him, necessitated by the specialized nature of her work. Comments were made by Johnson to claimant on a frequent basis of a relatively crude and demeaning nature such as when he observed her bending over from the rear he would offer that he could 'ram it home'. He would make dialing motions simulating the spinning of her breasts. He suggested that he would get her in a corner and 'cop a feel'. He would offer to take her to the basement and give her a 'Johnson treatment'. He asked her when she was going to 'get something' to fill out her sweater. When she was using a cushion, he observed that if she had 'meat on her ass she wouldn't need a cushion'. When she was sick, it was offered that she needed 'petercillin' to fix her up.

"The last incident shortly before claimant's quitting was one where claimant testified that Johnson grabbed his crotch or groin area and stated, 'What you need is this'. Claimant testified as to being very seriously upset as to this and expressing in dismay to herself--'What is this coming to?'

"Claimant may be faulted for not specifically complaining. She only responded with amiguous parries like, 'promises, promises' or 'all you think of is sex'. She said in effect that these were intended to deflect and end Johnson's comments.

"The Referee noted Mr. Johnson's demeanor and responses to Mrs. Luke's questions and finds Mrs. Luke apparently struck chords of emotions that were inappropriate and out of proportion. The Referee understands as counsel for the employer argued that it would be understandable that any employer would become very

the employer and would of course be furious and disturbed at the legal costs incurred. However, the Referee sensed there was more than this in the responses and the tone of the denials confirmed more than the words of denial.

"The referee does find that Mary Luke was the subject to [sic] an inordinate amount of unsolicited and unwanted comments about her person and subject to demeaning sexual remarks.

"It is also found that shortly before her quitting that there was the 'what you need' incident, an escalation of conduct, even more embarassing and demeaning than the previous conduct. The Referee finds that this played an important reason in claimant's quitting. The Referee finds that claimant Luke had only tolerated the conduct on the basis of economic necessity. There was no higher up to appeal to. She did not truly condone and certainly she did not significantly reciprocate the conduct in question. The Referee finds there was 'good cause attributable to the employer or employing unit' permitting claimant Luke to quit without disqualification."

On appeal, defendant argues that the commission's adoption of the referee's findings is contrary to law and unsupported by substantial evidence on the whole record. We disagree, as did the circuit court before us.

First, we are not persuaded that plaintiff, in order to establish "good cause attributable to the employer", was required to prove that she had complained to Mr. Johnson of the sexual harrassment and requested remedial action to no avail. In fact, plaintiff did not complain to Mr. Johnson and never requested any relief. Defendant argues that plaintiff's failure to take these two steps renders her claim insufficient as a matter of law. In support of this position, defendant relies on a "field release", dated February 23, 1979 and issued to the commission's administrative staff, district supervisors and branch office managers. The release or memo references "sexual harrassment as an issue in unemployment compensation adjudication" and offers several suggestions. In relevant part, the release states:

"In order to avoid disqualification, the claimant must demonstrate that sexual harassment had occurred, that he or she informed the employer of such occurrence, that remedial action was requested, and that the situation was not remedied."

While this Court has held that agencies may not violate their own rules and regulations, we have limited this general

principal "only to rules which evince an intent of the agency to establish mandatory rules which must be followed by the agency." Golembionski v Madison Heights Civil Service Comm (After Remand), 128 Mich App 682, 687; 341 NW2d 793 (1983). As far as we can ascertain from the record before us, the "field release" relied upon by defendant is an intra-agency document generally sounding on the difficulties of evaluating voluntary terminations attributable to sexual harrassment. While the release incorporates several specific recommendations as to the manner in which to proceed in these cases, we find no basis for viewing the release as a mandatory administrative rule.

Employees who have voluntarily left their employment for reasons of sexual harrassment need not prove that they sought to remedy the situation before quitting in order to avoid the disqualification sanctions of MCL 421.29(1)(a) and (3); MSA 17.531(1)(a) and (3). We are particularly reluctant to impose such a burden where, as here, the sole owner of the business is also the source of the harrassment. The employee already bears the burden of proving that his or her reasons for voluntarily leaving employment constitute good cause attributable to the employer and we find this burden sufficient. See Cooper v University of Michigan, 100 Mich App 99, 102; 298 NW2d 677 (1980) and Blom v Thermotron Corp, 139 Mich App 50, 56; 360 NW2d 172 (1984). We note that when the Michigan Supreme Court held that "personal reasons may constitute good cause" for voluntarily terminating employment it did not require the employee to first approach the employer in an attempt to work out any personal difficulties. Dueweke v Morang Drive Greenhouses, Inc, 411 Mich 670, 679; 311 NW2d 712 (1981). MESC "good cause" findings do not impose civil liability for damages upon employers for wrongful or illegal conduct. The sole purpose of these proceedings is to determine whether an employee should be subjected to the disqualification sanctions of MCL 421.29(a)(a) and (3); MSA 17.531(1)(a) and (3).

Defendant next takes issue with the factual findings of the referee arguing that the only reason plaintiff quit was because of the "conspiracy" reprimand. As noted by the referee, this incident alone would not constitute good cause for voluntarily terminating employment. See Butler v City of Newaygo, 115 Mich App 445, 449; 320 NW2d 401 (1982). Our review of the transcripts of the hearings conducted in this case, however, persuades us that competent testimony was provided on both sides of the sexual harrassment issue. In his findings and opinion, the referee addressed each area of contention and explained his reasons for resolving each conflict as he did. While we think the case presents a close question, we will not disturb the factual findings of the commission unless they are unsupported by competent, material and substantial evidence on the whole record. MCL 421.38; MSA 17.540. Defendant's challenge to the commission's findings in this case relate primarily to the credibility of the witnesses, the resolution of which is within the sole authority of the commission. See Miller v F.W. Woolworth Co., 359 Mich 342, 352; 102 NW2d 728 (1960), quoting Lenz v Mayor of Detroit, 343 Mich 599, 610; 73 NW2d 285 (1955).

Affirmed.

/s/ Richard M. Maher
/s/ Michael J. Kelly
/s/ Harvey W. Moes

FOOTNOTE

[1] Two other employees also quit that day because of the same incident. Their claims were consolidated with plaintiff's for purposes of the MESC hearings but the referee concluded that their only reasons for quitting related to the conspiracy reprimand and that was not sufficient to establish good cause attributable to the employer.