ZEMBAL V. N.M. DEP'T. OF WORKFORCE SOLUTIONS

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FRANK R. ZEMBAL,
Petitioner-Appellant,
v.
NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS, and SOUTH PLAINS IMPLEMENT, LTD.,
Respondents-Appellees.

No. 32,205

COURT OF APPEALS OF NEW MEXICO

December 10, 2013

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Manuel I. Arrieta, District Judge

COUNSEL

New Mexico Legal Aid, Robert Greenbaum, Las Cruces, NM, for Appellant

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JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, JONATHAN B. SUTIN, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} In this case, Petitioner appeals the denial of his claim for unemployment benefits. The appeals tribunal of the Department of Workforce Solutions (the Department) initially denied Petitioner compensation because the Department concluded that Petitioner voluntarily terminated his employment without good cause. The Department's decision was subsequently upheld by the secretary of the Department and by the district court on appeal. The case is now before us pursuant to a writ of certiorari. *See* Rule 12-505 NMRA. Because we conclude that the Department's decision was not arbitrary and capricious and that there was substantial evidence supporting the Department's decision that Petitioner voluntarily terminated his employment without good cause, we affirm.

{2} Because this is a memorandum opinion and the parties are familiar with the facts and procedural background of this case, we reserve discussion of the pertinent facts for our analysis.

DISCUSSION

Standard of Review

{3} Our review of this matter is identical to that of the district court. *Kramer v. N.M. Emp't Sec. Div.*, 1992-NMSC-071,¶ 5, 114 N.M. 714, 845 P.2d 808. We review the whole record of the administrative hearing to determine whether the agency's decision was arbitrary and capricious or not supported by substantial evidence. *Id.*; *see* Rule 1-077 NMRA. An agency's decision is arbitrary and capricious "if it is unreasonable or without a rational basis." *Selmeczki v. N.M. Dep't of Corr.*, 2006-NMCA-024, ¶ 13, 139 N.M. 122, 129 P.3d 158 (internal quotation marks and citation omitted). "Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 5, 108 N.M. 380, 772 P.2d 1303.

The Basis of the Department's Decision Was Not Arbitrary and Capricious

{4} Petitioner argues that the Department's decision was arbitrary and capricious because it was based on Petitioner's failure to contemporaneously report the harassment and misconduct of his supervisor Talamantes. While we agree with Petitioner that an employee's failure to contemporaneously report misconduct does not preclude an employee from establishing good cause to voluntarily terminate employment, we conclude that Petitioner's arguments misconstrue the basis of the Department's decision.

{5} NMSA 1978, Section 51-1-7(A)(1) (2011) provides that "[a]n individual shall be disqualified for[,] and shall not be eligible to receive[,] benefits: . . . if it is determined . . . that the individual left employment voluntarily without good cause in connection with the employment." Petitioner does not challenge the Department's determination that he

voluntarily terminated his employment. Thus, we limit our analysis to the Department's determination that he did so without good cause. *See Fitzhugh v. N.M. Dep't of Labor*, 1996-NMSC-044, ¶ 28, 122 N.M. 173, 922 P.2d 555 ("Section 51-1-7(A) suggests a two-part analysis. First, whether [the employee] left her employment voluntarily. Second, if we conclude that [the employee] quit, whether she did so for good cause in connection with her employment.").

{6} "Good cause is established when an individual faces compelling and necessitous circumstances of such magnitude that there is no alternative to leaving gainful employment." *Molenda*, 1989-NMSC-022, ¶ 6. It is an "objective measure of real, substantial and reasonable circumstances which would cause the average able and qualified worker to quit gainful employment." *Id.* Good cause encompasses "the concept of good faith[,]" which is evidenced by a "genuine desire to work and be self- supporting absent fraud." *Id.* Good faith, in turn, includes the concept of reasonable notice. *Kramer*, 1992-NMSC-071, ¶ 12. Reasonable notice "imposes a duty upon the employee to attempt to resolve his or her work-related problems with the employer before voluntarily quitting . . . and receiving unemployment benefits." *Id.* Notice is considered "adequate and reasonable as long as all opportunities to rectify the problems precipitating resignation have been exhausted or deemed futile." *Id.* ¶ 14.

{7} The Department stated in its decision, "This decision turns on [Petitioner's] failure to report his service manager's conduct to management at the time it occurred." From this statement, Petitioner argues that the Department based its decision on a misapprehension of the law because the good cause standard embodies no requirement that a claimant contemporaneously report alleged harassment by a supervisor. Petitioner is correct that there is no such requirement, and the Department's statement in its decision, taken by itself, would certainly support his argument that the decision was based on an improper standard. However, immediately following that statement, the Department stated, "Had [Petitioner reported the conduct], management could have investigated the claims and made an informed, timely decision about those claims and taken any corrective action management deemed necessary." The Department also stated, "Simply leaving work without any efforts to resolve grievances or problems is not consistent with a genuine desire to be employed." Thus, when read as a whole, the Department's decision is not based on a contemporaneous reporting requirement. Instead, it is rooted in the good faith notice requirement and a determination by the Department that the timing of Petitioner's notification to management and his voluntary termination did not afford his employer an opportunity to investigate Petitioner's claims and take proper remedial action. *See Kramer*, 1992-NMSC-071, ¶ 12 ("The policy underlying this good-faith notice requirement is eminently reasonable: it allows the employer an opportunity to redress the problem that might lead to the employee's resignation and an improper award of unemployment benefits while trying to accommodate the employee's concerns[.]"). Accordingly, we conclude that the basis of the Department's decision was not arbitrary and capricious.

Substantial Evidence Exists to Support the Department's Decision That Petitioner Voluntarily Terminated His Employment Without Good Cause

{8} Having determined that the standard underlying the Department's decision was proper, we now consider whether there was substantial evidence supporting the Department's conclusion that Petitioner did not provide reasonable notice to his employer in regard to the harassment and therefore did not voluntarily terminate his employment with good cause. Petitioner challenges various findings by the Department that found that Petitioner did not reasonably notify his employer of the alleged harassing behavior. Implicit in Petitioner's argument is the contention that his reporting the incidents of alleged misconduct at the March 1 meeting provided his employer with reasonable notice sufficient to give the employer an opportunity to redress Petitioner's complaints. We conclude that while Petitioner did notify his employer about many of the incidents involving Talamante during the March 1 meeting, there was substantial evidence supporting the Department's conclusion that Petitioner did not provide his employer with a reasonable opportunity to redress his grievances before terminating his employment.

{9} There was substantial evidence adduced at the hearing to support the following time line of events. On March 1, Petitioner met with Talamantes and Mr. Coffman, the store manager, to discuss Petitioner's alleged failure to show up for work on three occasions. It was at this meeting that Petitioner first notified Coffman of Talamantes' alleged harassing behavior. After it became apparent during the meeting in March that there were issues between Talamantes and Petitioner, Coffman sent Petitioner home and told him to wait until he called him.

{10} During the ensuing week, Coffman undertook an investigation of Petitioner's claims and testified that he spoke with various employees who disputed aspects of Petitioner's allegations. Despite these conflicting reports, it was clear to Coffman that Petitioner and Talamantes had an acrimonious relationship. Coffman therefore spoke with Petitioner during that week regarding Petitioner's willingness to transfer to another of the employer's locations. Petitioner testified that he rejected this offer due to the commute it would involve, his unfamiliarity with servicing older equipment, and the possibility that he would receive less commissioned pay. During this conversation, Petitioner suggested to Coffman that either Talamantes be fired or Petitioner would quit.

{11} On March 8, Petitioner met with Coffman and the owner of the employer, Mr. Snodgrass. Petitioner reiterated his allegations of harassment by Talamantes but did not include additional allegations of harassment that allegedly occurred immediately after the March 1 meeting and that Petitioner later testified about during the hearing. Petitioner again refused to work under Talamantes or accept a transfer to another location. Ultimately, because the employer was unwilling to fire Talamantes, it considered Petitioner's ultimatum to be his resignation, effective March 8.

{12} Given this evidence, we agree with the Department that substantial evidence supported the conclusion that Petitioner voluntarily terminated his employment without good cause. The Department essentially found that Petitioner's simultaneous reporting of the alleged harassing behavior, coupled with an ultimatum that either Talamantes be fired or Petitioner would quit, did not evidence a reasonable effort by Petitioner to

resolve his grievances. Similarly, the Department concluded that Petitioner's insistence that any resolution short of Talamantes' firing would result in his quitting did not evidence a good faith effort to afford the employer an opportunity to adequately rectify the situation. *See Kramer*, 1992-NMSC-071, ¶ 12. The evidence supported the Department's determination that by placing such conditions on the resolution process, Petitioner's actions were inconsistent with a genuine desire to be employed. *See id* ¶ 14.

{13} Finally, we briefly address Petitioner's arguments that he had good cause for voluntary termination based solely on Talamantes' alleged harassing behavior. On this point, we emphasize that workers have a duty to provide good faith reasonable notice to the employer and that this is not a separate inquiry from the determination of good cause. *See id.*, ¶ 12; *Molenda*, 1989-NMSC-022, ¶ 6. We recognize, however, that in rare circumstances an employer's behavior could be found to be so egregious that it would be apparent that nearly any attempt by the employee to rectify the situation would be futile. *See Kramer*, 1992-NMSC-071, ¶ 14 (stating that notice is reasonable where "all opportunities to rectify the problems precipitating resignation have been exhausted or deemed futile"). While we agree with Petitioner that his allegations regarding Talamantes' behavior are troubling, we cannot conclude that this case presents such an egregious situation. The Department made no clear finding that the incidents in fact occurred as Petitioner testified, despite the Department's statement that its decision did not turn on Petitioner's veracity. Indeed, there was conflicting testimony by Petitioner and Coffman regarding the incidents, and we do not construe the Department's statement regarding Petitioner's credibility as a wholesale adoption of Petitioner's version of events. Rather, the Department's statement, in context, evidences what has been apparent to all involved—that Petitioner and Talamantes had a caustic working relationship. And we cannot conclude that such a relationship is sufficient, by itself, to relieve Petitioner of his burden to make a good faith effort to resolve his grievances.

CONCLUSION

{14} For the foregoing reasons, we affirm the district court's denial of Petitioner's claim for unemployment benefits.

{15} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

JONATHAN B. SUTIN, Judge