

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

DIMITRI'S RESTAURANT,
Employer-Appellant,

v

ROSEMARY N. LEONARD,
Claimant-Appellee,

and

MICHIGAN EMPLOYMENT
SECURITY COMMISSION,
Appellee.

Docket No. 84-1550 AE

Dated: October 25, 1984

Before: Hon. James C. Daner

JOHN KATSOULOS (P 15742)
Attorney for Employer-Appellant

MARK E. TROMBLY (P 28637)
Attorney for Claimant-Appellee

FRANK J. KELLEY, Attorney General
for the State of Michigan
By: DENNIS J. GRIFKA (P 23048)
Assistant Attorney General
Attorneys for Appellee M.E.S.C.

OPINION and ORDER

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NO. 84-1550-AE

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MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

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OPINION AND ORDER

This is an appeal pursuant to MCL 421.38 from the decision of the Michigan Employment Security Commission, Board of Review, reversing a Referee finding that claimant, Rosemary N. Leonard, is disqualified from receiving benefits by MCL 421.69(2)(a) because she left work voluntarily without good cause attributable to the employer.

A lengthy record was developed by the referee in three separate hearings. A careful review of the testimony is necessary for an understanding of this case, since the result depends entirely upon the credibility of the witnesses, and the weight thereof, and corroboration.

Claimant testified that she worked for the restaurant from October, 1979, through April 17, 1981, at which time she quit due to the physical and verbal sexual abuse on herself, and being blamed for the conduct of a female friend, and because her hours were reduced. Claimant stated that, over the course of the two and one-half years of her employment, George and

Michael Seros, the sons of the owner, who managed the day-to-day operation of the restaurant, pinched and grabbed her in a sexually-suggestive fashion, made suggestive comments, and used vulgarities. She stated that, on one occasion, she received a \$100 tip on a charge slip. George Seros asked her if she had to give the customer a "blow job" for the tip.

Claimant admitted that obscene language was not unusual or shocking in a bar atmosphere but felt her employer should act more responsibly. Customers spoke foully, but never touched her. The problems with the employers usually occurred on Saturday mornings when no other females were present. She stated two incidents in particular "broke the camel's back", and caused her to give up a good paying job: George Seros took claimant into the parking lot and confronted her with the actions of a woman friend who allegedly was intoxicated the night before and offered to perform a sexual act on several customers. Secondly, claimant had great respect for James Seros and relied upon him for advice. In the last several months she worked there, James Seros called her into his office, closed the door, pulled her on his lap, and fondled her. Her respect and admiration of James Seros was confirmed by several witnesses, including Michael Seros. Claimant stated that she was surprised by James Seros's actions and, in a large part, quit because of them. She had gotten used to George and Michael. Claimant also testified that George and Michael called the waitresses off-color nicknames.

Janet Belloli, a waitress from May, 1980, testified that claimant told her of the James Seros incident. Belloli also

Demopoulos testified that she was subjected to verbal abuse. If she came to work smiling, she was asked if she had got laid the night before. One day, a comment was made by George that, if she wanted a walk (at her request due to the lack of a break), she could go into the bathroom and play with herself with a bottle. George also once, while drinking, told her about another employee who went to the Georgian Inn Motel with him and said it would be okay for her to go to the Georgian Inn with him. This happened late at night while the doors of the restaurant were locked and Demopoulos was cleaning up. Her husband came to the restaurant and demanded that George let her go home after he had made three phone calls which resulted in delaying excuses by George. She testified the Seros' called the waitresses nicknames like "big tits", "dragon breath", "shit bag", and "flash". They made comments about waitresses as the waitresses walked by. James Seros one day talked to Demopoulos about it being okay to have an affair with a married man. Demopoulos observed Michael grabbing claimant on the bottom and her angry expression in response. Claimant told Demopoulos that she was quitting because she was tired of what was going on.

Mary Stachowitz testified that she was a waitress from October, 1978, through August 5, 1981. While she was never touched by the employers and never saw anyone touch claimant, she was working in a different part of the restaurant and was aware that claimant was treated differently. Stachowitz quit because she was harassed by George and Michael with respect to her work performance. George and Michael were often threatening to fire "girls". One day, Stachowitz was waiting on a table

while Michael was present, and the customer, who was a regular, grasped Stachowitz by the breast and made a lurid offer. Instead of assisting her, Michael said he had a phone call and left. Stachowitz was shocked and went to the kitchen. No action was ever taken with regard to the customer.

The waitresses used to wear a skirt, vest and blouse. Approximately one year before the hearing, before claimant quit, management switched to a "very brief" uniform. Stachowitz confirmed that the waitresses were called the names referred to above and tolerated it, but did not like it. George called Stachowitz in October of 1981, before the hearing, and stated that he was in trouble in the hearing and asked her for help. He also asked her to come back to work.

Victoria Gibilisco has been employed at the restaurant since it opened. She started as a part-time waitress and later became the hostess. The others considered her a very close friend of the employers. She testified that claimant wrote a poem to George Seros on a birthday card in July of 1980:

"Roses are red
Violets are blue,
I'd like to suck
And f - - - you."

The testimony is not clear, but it appears the poem was signed by Gibilisco as well. Gibilisco testified that she never saw any of the employers touch claimant but, over the years, saw claimant pinch and "goose" them numerous times. She also overheard claimant use vulgar and sexually-suggestive language with customers as well as George and Michael. Claimant had a dying boyfriend she lived with and also other boyfriends who would come to the restaurant. Claimant never complained to her before quitting. Gibilisco was aware of the nicknames with sexual connotations.

George Seros testified that he never touched claimant, but that she touched him in sexually-suggestive ways many times. She never complained of harassment but, rather, harassed him. He had to ask her to stop using vulgar language many times. He loaned claimant \$200 to go to Las Vegas with an ex-boyfriend while her current boyfriend was dying of cancer. Only a portion of the loan was repaid. He cut back her hours after the funeral of her boyfriend because they had to hire someone to replace claimant during her absence in her friend's last illness and did not want to offend the new waitress by denying her hours. He was going to restore claimant's hours as soon as possible. He testified he did not threaten claimant regarding her friend but merely asked claimant to request the friend not to return to the restaurant. He didn't refer to waitresses by nicknames, and doesn't remember specific nicknames, although he was aware there were nicknames. He confirmed that he got the birthday card with the vulgar poem.

Gerald Haladye testified he was a patron for three or four years and considered himself a friend of claimant. On an average, he spent twenty hours a week there. Claimant commonly used vulgar and suggestive language, told him he had "cute buns" and, approximately three times, took her bra off behind the bar and wiggled around. He never saw her grabbed by anyone and heard no complaints from her.

Michael Seros testified that claimant used vulgar and suggestive language. She called herself "big tits" and "mother jugs". She made a big deal out of the \$100 tip she received; he did not make the alleged derogatory comment. He asked her not

to use foul language many times. None of the employers ever touched claimant. On the other hand, she frequently touched them. She confided and relied upon James Seros for advice with reference to her personal life. She constantly sat on James Seros's legs and acted "hoochy coochy". James just let her have her fun and did not respond. She made a big deal about a new car purchased while her boyfriend was dying, borrowed \$200 to go to Las Vegas with another man at approximately the same time, and danced on the bar during George's birthday.

This Court reviews the agency's determination pursuant to the standards set forth in MCL 421.38 and Const 1963, Art VI, Sec. 28. The proper standard of judicial review to be employed is whether the decision is supported by competent, material, and substantial evidence on the whole record. King v Calumet & Hecla Corp., 43 Mich App 319; 204 NW2d 286 (1972). "Substantial evidence" has been defined as evidence which a reasoning mind would accept as sufficient to support a conclusion. While it consists of more than a mere scintilla of evidence, it may be less than a preponderance of the evidence. Tompkins v Dept of Social Services, 97 Mich App 218, 222; 293 NW2d 771 (1980).

As can be gathered from the diametrically-opposed testimony, the real issue here is the determination of which side's evidence is the more credible and corroborated. The referee obviously resolved the credibility question in the employer's favor. However, the referee was mistaken when he stated that "the record is devoid of any corroboration by any of the claimant's witnesses which would substantiate any of the allegations". The referee then analyzed at length whether the civil action

interest to be true in many respects, and are refuted by other witnesses. Victoria Gibilisco is a very close personal friend of theirs, as well as a long-time and present employee of the restaurant, who would suffer if her testimony was other than favorable, and her testimony thus suffers from interest, prejudice, and bias. The long-term customer who spends approximately twenty hours a week in the restaurant is not exactly an independent, unbiased, objective source. The Court is also unfavorably impressed with George's contacting Mary Stachowitz prior to the hearing. Further, their impugning of claimant's character, while protesting their innocence and denying in toto every bit of evidence of claimant and her witnesses, is too legally tainted to be credible.

The April 2, 1984, decision of the Michigan Employment Security Commission, Board of Review, should be and the same is hereby AFFIRMED.

IT IS SO ORDERED.

An Order consistent with this Opinion shall be entered by the attorneys within twenty (20) days. The Court retains no further jurisdiction.


James C. Daner, Circuit Judge

Dated: October 25, 1984