

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0320

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 30, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 105448). Claimant filed a timely request for hearing. On February 18, 2014, ALJ Kirkwood conducted a hearing at which the employer did not appear, and on February 19, 2014 issued Hearing Decision 14-UI-10631, affirming the Department's decision. On February 25, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that presented new facts not found in his hearing testimony. Claimant also submitted several emails from a prospective employer that were not introduced at hearing to show that the job offer he received from that employer was a definite offer within the meaning of OAR 471-030-0038(5)(a). However, claimant did not show, as required under OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond his reasonable control prevented him from offering this new information during the hearing. For this reason and given the ample opportunity the ALJ allowed to claimant to present evidence at the hearing, EAB considered only information received into evidence at the hearing when reaching this decision. Moreover, even if this new information were considered, our conclusion that claimant left work without good cause would not change, for the reasons explained below.

FINDINGS OF FACT: (1) New York Life Insurance Company employed claimant as an agent selling securities and other investment products from July 27, 2012 until November 22, 2013.

(2) The field of securities is heavily regulated. To sell securities and investment products, claimant was required to register with the Financial Industry Regulatory Authority (FINRA). At any given time, claimant could only be affiliated with one employer for purposes of registration with FINRA. The employer registered claimant with FINRA as affiliated with it.

(3) At some point during his employment, claimant hired his wife to work as his office assistant. In the summer of 2013, while at an office event, one of claimant's male coworkers had "essentially solicited" claimant's wife for sex. Audio at ~10:50. This encounter disturbed claimant and his wife. The coworker who had approached claimant's wife was also having an affair with a female senior partner who worked for the employer. This senior partner had trained and mentored claimant after he was hired and helped him develop new business. Until the summer 2013 office event, claimant thought he had a close working relationship with the senior partner.

(4) Shortly after the summer 2013 office event, claimant approached his coworker to discuss what had happened between the coworker and claimant's wife. The coworker initially denied that the incident had happened then made excuses for his behavior. Audio at ~12:16. As the interaction developed, claimant and the coworker "yelled at each other." Audio at ~29:40. After this incident, claimant and his wife felt "very awkward" when they were in the office. Audio at ~12:52. The coworker continued to try to speak with claimant's wife when she was in the office and claimant was not.

(5) Sometime after claimant's encounter with his coworker, claimant determined it was necessary to relocate his office to avoid the coworker. Claimant's existing office was between the coworker's office and the senior partner's office. Claimant approached the senior partner to discuss the incident between his coworker and his wife and his desire to change the location of his office. In their conversation, the senior partner principally expressed her concern to claimant that she would lose her job if the affair between her and the coworker was discovered by management. The senior partner did not take any action on claimant's behalf. After claimant spoke with the senior partner, claimant noticed that the senior partner was "unresponsive" to his emails, canceled her weekly meetings with him, and "avoided" him in the office. Audio at ~28:06.

(6) Sometime after claimant spoke to the senior partner, claimant contacted the managing partner in the office about the situation. However, when he spoke with the managing partner, claimant did not reveal "all the details" to the managing partner because he did not want to jeopardize the senior partner's employment. Audio at ~26:15. Claimant's discussion with the managing partner "centered around how can I move my office out of here because I'm having an issue with another agent in the office," Audio at ~26:50. Claimant did not tell the managing partner the nature of those issues. The managing partner told claimant that he had recently made a great effort to consolidate all financial agents in one central office and that claimant's employment contract did not allow him to work as a detached agent. The managing partner told claimant he could not move his office.

(7) In September 2013, claimant's wife stopped working with claimant because she had decided to return to school and she no longer reported to claimant's office. Around this same time, claimant decided he was going to leave work. Although there had been no confrontations with the coworker since the one shortly after the summer office event, claimant remained uncomfortable in the office and perceived "some sort of retribution" in the coworker's attitude. Audio at ~30:26. Claimant noticed that he and the coworker were now "very competitive" when working together on joint accounts. Audio at ~30:40. Claimant became suspicious that the coworker had obtained keys to his office from the senior partner and was entering it without permission. Audio at ~30:30. Claimant also thought that he needed to leave work because the senior partner was integral to his success and, by no longer being so helpful to him, his job became "much more difficult." Audio at ~28:06

(8) Claimant experienced stress during his final year of working for the employer. Claimant's blood pressure increased from a normal range to 192/100, which he attributed to stress. Claimant also experienced diarrhea and headaches, which he also attributed to stress.

(9) In October 2013, claimant started interviewing for new jobs. In approximately mid-November 2013, a potential employer offered claimant a job selling securities and investment products. Claimant accepted that job. The potential new employer told claimant the compensation arrangements and that the job was expected to begin "after Thanksgiving," which was November 28, 2013. Audio at ~19:20. Before he could sell securities for the new employer, claimant's affiliation with the new employer needed to be registered with FINRA.

(10) On November 22, 2013, claimant submitted his resignation to the employer and quit work.

(11) After November 22, 2013, the employer did not immediately process claimant's resignation to enable the new employer to register claimant's new affiliation with FINRA. The employer did not notify FINRA that claimant was no longer working for it until December 9, 2013.. Audio at ~20:05. By that time, the offered job was no longer available to claimant because the new employer had not been able to register claimant's new affiliation with FINRA.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Although he did not contend his physical condition contributed to his decision to leave work, claimant testified that he developed high blood pressure during the final months of his employment. Audio at ~32:43. For purposes of this decision, we assume claimant's high blood pressure was a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for his employer for an additional period of time. If a claimant who leaves work to accept an offer of other work, good cause exists only if, among other things, the offer is definite and the work is to begin in the shortest length of time as deemed reasonable under the circumstances. OAR 471-030-0038(5)(a).

Claimant contended that the job offer he received from the potential employer in mid-November 2013 did not cause him to quit work, and that he would still have left work on November 22, 2013 even if no job had been offered to him. Audio at ~21:17, ~23:13. Regardless of claimant's contention, the timing of his decision to quit so soon after receiving the job offer suggests he was motivated, at least in part, by that pending offer. To constitute good cause to leave work, OAR 471-030-0038(5)(a) requires that a job offer be "definite." The Department's Benefits Manual states that a job offer is not definite within the meaning of OAR 471-030-0038(5)(a) if it is "contingent upon anything." Benefits Manual (rev. April 2, 2013), Ch. 400 §422(B). It is undisputed that the new employer offered claimant a job selling securities

and other investments, and that to lawfully fill such a position, claimant's affiliation with the new employer needed to be registered with FINRA. Audio at ~20:05. It appears that claimant could not start work for the new employer until the new FINRA affiliation was completed. As a matter of common sense, since the offered job was predicated on a successful registration with FINRA, it was contingent on that registration. Although claimant argued at hearing that the reason that his affiliation could not be changed to the new employer was due to the employer's delays, that argument ignores the language of OAR 471-030-0038(5)(a). The reason that a condition to a job offer is not fulfilled does not make the job offer any more definite at the time it was made. Audio at ~20:05. Because the job offer claimant received was contingent on changing his registered affiliation with FINRA to the new employer, it was not a definite job offer under OAR 471-030-0038(5)(a) and did not constitute good cause for claimant to leave work to accept that offer.

The workplace environment, or more specifically, a deterioration in claimant's working relationships with the coworker who had approached claimant's wife in the summer of 2013 and with the senior partner, were the other reasons claimant contended that he decided to leave work. Audio at ~10:50, ~11:57, ~22:34, ~28:00. Since claimant's wife was no longer working with him by September 2013, her interactions in the workplace were not reasonably a cause of claimant's decision to quit in November 2013. With respect to claimant's encounters with the coworker, claimant was not able to point out any specific behaviors of the coworker that, after their confrontation in the office, caused him to leave work. Claimant's explanations for leaving were a vague sense the coworker planned "retribution" against him and that he and the coworker had become "very competitive." Audio at ~28:56, ~30:20. With respect to the senior partner, claimant expressed that his relationship with her was strained and she had ceased being as responsive and helpful to him as she had previously been. Audio at ~28:06. Claimant did not describe any behaviors by either the senior partner or the coworker that, viewed objectively, created a hostile or abusive work environment. The vague feelings of foreboding and the awkwardness in work relationships that claimant described are insufficient to demonstrate the level of oppression traditionally required to establish good cause for leaving work due to relationships with coworkers or supervisors. *See McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (claimants not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits); *Beth A. Jackson* (Employment Appeals Board, 13-AB-0502, April 2, 2013) (ongoing unwanted sexual advances and touching despite making complaints); *Brenda A. Kordes* (Employment Appeals Board, 12-AB-3213, January 8, 2013) (ongoing sexual harassment); *Stephen G. Wilkes* (Employment Appeals Board, 12-AB-3173, December 14, 2012) (ongoing verbal abuse despite complaints); *James D. Hayes* (Employment Appeals Board, 11-AB-3647, February 9, 2012) (sexist and ageist remarks); *Pamela Latham* (Employment Appeals Board, 11-AB-3308, December 22, 2011) (supervisor's ongoing verbal abuse and fits of temper); *Shirley A. Zwahlen* (Employment Appeals Board, 11-AB-2864, December 12, 2011) (management's ongoing ageist comments and attitudes); *Denisa Swartout* (Employment Appeals Board, 11-AB-3063, October 28, 2011) (corporate culture hostile to women); *Kathryn A. Johnson* (Employment Appeals Board, 11-AB-2272, September 6, 2011) (supervisor's regular fits of temper and verbal abuse). Claimant's vague feelings of foreboding and awkwardness in the workplace were not sufficient to constitute an objectively grave reason for leaving work.

Even if claimant had grave reasons to quit, he did not take the actions of a reasonable and prudent employee before deciding to leave work when he did. At hearing, claimant testified only to speaking

with the senior partner and the managing partner on one occasion to attempt to rectify the atmosphere he perceived in the workplace. Audio at ~22:34, ~25:55. When asked by the ALJ whether he had contacted the employer's human resources department, claimant testified that he had not and only referred to his conversations with these two partners. Audio at 25:15. Claimant conceded that he did not tell the managing partner of the "whole situation" surrounding his difficulties in the workplace, and we infer that he did not disclose that his wife had been sexually approached by his coworker or that the senior partner was unwilling to assist him in resolving the difficulties in his working relationship with the coworker. Audio at ~25:55, ~26:50. A reasonable and prudent employee who had high blood pressure, exercising ordinary common sense and who wanted to remain employed, would not have decided to leave work until he fully and honestly explained the situation to the managing partner or the human resources department and determined whether one or the other was able to assist him when the senior partner would not. Because claimant did not take the actions of a reasonable and prudent person before deciding to quit, he did not show that he had good cause to leave work.

Claimant did not demonstrate that there was good cause for him to leave work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-10631 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, not participating.

DATE of Service: March 20, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.