

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0528

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On January 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 103013). Claimant filed a timely request for hearing. On March 18, 2014, ALJ Hoppe conducted a hearing, and on March 27, 2014, issued Hearing Decision 14-UI-13665, affirming the Department's decision. On April 2, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant requested that we review "new evidence" consisting of a post hearing medical report from his psychiatrist concluding claimant had suffered from bipolar disorder throughout his employment. OAR 471-041-0090 (October 29, 2006) allows EAB to consider new information if the party offering the information shows that the information is material to our decision and the party was prevented by factors or circumstances beyond his reasonable control from presenting the information at the hearing. The report was not material to our decision because we accepted claimant's testimony that he was diagnosed with bipolar disorder in 2007 and received treatment for several years. Because claimant did not make the required showing, his request that we review his new information is denied.

EAB considered the remainder of claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) WMK Management LLC employed claimant as a restaurant server from May 21, 2012 to December 26, 2013.

(2) In 2007, claimant was diagnosed and began treatment for bipolar disorder and in 2012 he was diagnosed and began treatment for depression and anxiety.

(3) The employer had a handbook that notified employees that their employment was "at will", meaning employees could resign and the employer could terminate the employment "with or without notice or cause." Exhibit 22C. The handbook also notified employees the employer had a progressive discipline

policy that was “not a mandatory procedure” but one the employer could use to give employees notice of performance problems and afford them the opportunity to correct it. *Id.* The employer’s attendance policy also was contained in its handbook and notified employees that two instances of tardiness within a 30 day period was considered “excessive” and could result in a written warning and additional progressive discipline if not corrected. Claimant received a copy of the employer’s handbook at hire and was aware of its contents.

(4) On July 17, 2013, claimant “misread” the schedule and was 3.5 hours late for his shift. Exhibit 23C.

(5) On or around September 10, 2013, claimant received a written warning for conduct related to his service of a customer that he was told was an “initial” warning but which the employer classified as a “final” warning without notifying claimant. Exhibits 13C, 14C; Transcript at 8-12.

(6) On December 8, 2013, claimant reported to the employer that he was “running late” and was 30 minutes late for his shift. Exhibit 23C. On December 25, 2013, claimant again reported “running late” and was 21 minutes late for his shift. Exhibit 23C.

(7) On December 26, 2013, two supervisors requested a “coaching” meeting with claimant to discuss his “attendance problem.” Transcript at 6, 39. During the meeting, claimant became aware of the “final” warning that was issued to him in September. When he was told he was being given a final warning for excessive tardiness and could be terminated if he was late one more time, he became upset because he did not believe he deserved any “final warning” under the employer’s progressive discipline policy, was being subjected to an “unfair employment practice” and “[could not] take that kind of pressure.” Transcript at 5, 18, 31. Before the meeting ended, claimant said “we’re done”, turned in his uniforms and quit for that reason. Transcript at 8.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ. Claimant voluntarily left work without good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) 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 P2d 722 (2010). Claimant was diagnosed with bipolar disorder in 2007 and received treatment for anxiety and depression since 2012, permanent or long-term “physical or mental impairment[s]” as defined at 29 CFR §1630.2(h).¹ A claimant with those impairments who quits

¹ 29 C.F.R. §1630.2(h) defines “physical or mental impairment” as:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

Claimant quit work because he was upset about a December 26, 2013 meeting with his supervisors at which he was given a “final” warning and told he could be terminated for being late one more time for any reason. Claimant believed that his supervisors unfairly gave him a second “final” warning without progressive discipline and also felt that that he “[could not] take that kind of pressure” his supervisors imposed. However, claimant did not dispute he was tardy to work on December 8 and 25, and that he was tardy on those days for reasons other than just “running late.” Claimant also acknowledged that by being tardy twice in a 30 day period, his tardiness was “excessive” under the employer’s attendance policy. Nor did claimant dispute the employer’s evidence that the December 26 meeting was essentially a “coaching session” intended to get him back on track with regard to arriving at work on time and that the employer had no intention of terminating his employment. Although claimant undoubtedly felt pressured to strictly comply with the employer’s expectations, he chose not consult with the employer’s human resources department over what he considered to be an unfair employment practice. Nor did claimant consult with his physician about his mounting anxiety, even though claimant knew he suffered from mental impairments. On this record, claimant failed to meet his burden to establish that no similarly situated person with the characteristics and qualities of a person with his psychological disorders, exercising ordinary common sense, would have considered his circumstances so grave that he had no reasonable alternative but to quit immediately.

Claimant voluntarily left work without good cause and is disqualified from receiving unemployment insurance benefits until he has earned four times his weekly benefit amount from work in subject employment.

DECISION: Hearing Decision 14-UI-13665 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson, and J. S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 9, 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.