

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0663

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 94040). Claimant filed a timely request for hearing. On April 1, 2014, ALJ Kirkwood conducted a hearing, and on April 2, 2014 issued Hearing Decision 14-UI-14031, affirming the Department's decision. On April 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Copper Penny Tavern employed claimant from March 29, 2013 to January 11, 2014.

(2) Claimant worked for the employer as a dayshift bartender. The employer paid claimant Oregon minimum wage, which was \$9.10 per hour in 2014. Claimant also earned an average of \$40 to \$50 in tips per shift.

(3) Claimant was 50 years old. On January 11, 2014, the employer's owner told claimant that, because of her age, he was going to replace her with a younger bartender. The owner told claimant she could continue working for the employer as a cook, or working at night verifying that customers entering the employer's club were at least 21 years old. Both positions paid \$10 per hour and no tips.

(4) Claimant was not qualified to work for the employer as a cook. Claimant considered working at the employer's club at night too dangerous, given its history of violent altercations, including two recent shootings. Claimant therefore quit work after completing her shift on January 11, 2014.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant quit work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work when she 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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 14-UI-14031, the ALJ expressed doubt that the employer’s owner’s decision to replace her because he wanted a younger bartender was sufficient to create an “oppressive work environment,” and that, even if it did, claimant had the reasonable alternative of continuing to work for the employer while pursuing a complaint with the Oregon Bureau of Labor and Industries (BOLI).¹ Thus, although the ALJ conceded that the employer *may* have engaged in age discrimination, she concluded that claimant had not established good cause for quitting work.²

However, ORS 659A.030(1)(b) provides that it is an unlawful employment practice for an employer, because of an individual’s age if the individual is 18 years of age or older, to discriminate against the individual in compensation or in terms, conditions or privileges of employment. In this case, the employer, because of claimant’s age, discriminated against her in replacing her with a younger bartender, and essentially demoting her to a position which, due to a lack of tips, paid less than her current position. The employer therefore engaged in age discrimination in violation of ORS 659A.030(1)(b), which was sufficient to create an oppressive work environment for claimant.

We also disagree with the ALJ’s assertion that continuing to work for the employer while pursuing a BOLI complaint was a reasonable alternative to quitting. At hearing, the employer did not dispute claimant’s testimony that she was not qualified to work for the employer as a cook, and that it was too dangerous for her, as a 50 year old woman, to work at the employer’s club at night, given its history of violent altercations, including two recent shootings. Absent evidence to the contrary, claimant’s testimony was sufficient to establish that continuing to work for the employer was not a reasonable alternative to quitting.

We therefore conclude that claimant quit work with good cause. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-14031 is set aside, as outlined above.

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

DATE of Service: May 28, 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

¹ Hearing Decision 14-UI-14031 at 2-3.

² *Id.*

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.