

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0762

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 75011). Claimant filed a timely request for hearing. On April 23, 2014, ALJ Mann conducted a hearing at which the employer did not appear and issued Hearing Decision 14-UI-15879, affirming the Department's decision. On May 5, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Destination Sunriver Resort, Inc. employed claimant as a janitor from April 15, 2010 until February 16, 2014.

(2) On July 16, 2013, claimant was injured at work. Claimant was away from work due to this injury until August 13, 2013, when her physician released her to work with lifting restrictions and she returned to work. During claimant's absence, claimant used the leave she had accumulated during her employment and the employer did not give her an injury-related leave.

(3) In approximately the middle of September 2013, claimant filed a worker's compensation claim due to her on-the-job injury. The employer's worker's compensation carrier did not accept claimant's claim. At some point, claimant hired an attorney and the attorney assisted her in prosecuting a worker's compensation claim.

(4) After claimant's on-the-job injury and after she had filed the worker's compensation claim, claimant noticed that her supervisor started assigning to her the "hardest work" in her department. Audio at ~35:44, ~39:32. Although the supervisor never assigned work to claimant that exceeded claimant's medical restrictions, the supervisor stopped dividing difficult and unpleasant work among claimant and her coworkers and began disproportionately assigning it to claimant. Audio at ~40:00. Claimant did not complain to the employer about her supervisor's behavior because she had observed that other employees who made such complaints to the employer were "treated badly" afterward or "written up"

and the employer did nothing about the complaint. Audio at ~36:30. Claimant concluded that any complaint she might make was futile and might result in even more disparate treatment.

(5) Sometime in the middle of February 2014, a hearing on claimant's worker's compensation claim was scheduled and claimant's attorney and the employer's attorney negotiated to settle the claim. One day before the scheduled hearing, claimant's attorney told her that the employer was willing to settle the case. The attorney told claimant that the employer intended to discharge her "regardless of the outcome of the worker's compensation case." Audio at ~12:20. The attorney told claimant that he estimated that her likelihood of prevailing at hearing was a "50-50 chance or less" and that "there was a good chance that [she] would lose the case." Audio at ~29:30; ~32:46. The attorney told claimant that, if she accepted the settlement of her claim, the employer required that she agree to resign from employment and that, if she remained working, he thought that she "would be treated very badly." Audio at ~12:20, ~25:56, ~26:09; ~32:46. Claimant's attorney told claimant that he strongly recommended that she accept the settlement even though it required her to resign from work. Audio at ~29:01, ~30:44. Relying on her attorney's recommendation, claimant agreed to accept the settlement and resign from work. Audio at ~32:13. As a result of settling the worker's compensation case, claimant received sufficient funds from the employer to pay the medical and physical therapy bills she had incurred due to the injury and to receive \$9,000 after those bills were paid. Audio at ~28:18.

(6) On February 16, 2014, claimant resigned from work under the terms of the agreement settling her worker's compensation claim.

CONCLUSIONS AND REASONS: Claimant voluntarily left 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 P3d 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-15879, the ALJ concluded claimant did not have good cause to leave work when she did. The ALJ reasoned that, although claimant relied on her attorney's advice to accept the settlement agreement and its requirement that she resign, "claimant had the option not to accept the settlement" and "she could have continued to work for the employer." Hearing Decision 14-UI-15879 at 3. We disagree.

The employer did not appear at the hearing and there is no evidence to rebut any of claimant's testimony, including that she resigned because her attorney strongly advised her to do so. Although claimant's testimony at hearing was not completely clear, she appeared to testify that her attorney had advised her that the employer intended to not continue her employment even if she did not accept the terms of the proposed settlement and litigated the worker's compensation claim to its conclusion. *See and compare* Audio at ~12:20; ~26:09, ~29:30, ~31:42. We infer that claimant's attorney received his information

about the employer's intentions from the employer's attorney, and there is no reason to assume he did not accurately relay that information to claimant. Based on the attorney's statement to claimant, the ALJ's assumption that claimant might have continued her employment if she did not agree to settle the worker's compensation claim is not established by the record, even though claimant appeared to state in response to the ALJ's questions that she "believed" that she could have continued to work for the employer for at least some period of time if she had not agreed to the worker's compensation settlement. Audio at ~31:42. At best, the record is unclear about whether the employer intended to discharge claimant if she did not agree to accept the settlement and to resign.

Assuming that the employer did not intend to discharge claimant if she did not accept the settlement agreement, it appears, more likely than not, that claimant had compelling reasons to agree to enter the settlement agreement even though it required her to resign. The financial terms of the settlement provided the funds that allowed claimant to pay off the medical bills she had incurred due to her workplace injury, and we infer that she would not otherwise have been able to do so if she did not prevail on the worker's compensation claim. Audio at ~28:19. It does not appear that the employer was overly attentive to claimant's needs after her on-the-job injury when it required her to exhaust her accumulated personal leave when she was absent from work due to the injury. Audio at ~35:20. Claimant's testimony that her supervisor treated her disparately after her injury was plausible and, absent rebuttal evidence, it cannot be disregarded. Audio at ~34:20, ~38:32, ~40:00. We infer that claimant considered both her financial needs and the employer's disparate treatment of her after her injury when she evaluated her attorney's very strong advice that she accept the worker's compensation settlement. A reasonable and prudent employee, exercising ordinary common sense, who had been injured on the job, who needed funds to pay medical bills and who was subjected to dissimilar treatment from her supervisor that she could not reasonably attribute to any cause other than the injury, would have agreed to settle her worker's compensation claim even though the terms of that settlement required her to voluntarily leave work. On the facts in this record, claimant demonstrated good cause to leave work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-15879 is set aside, as outlined above.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: June 11, 2014

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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.