

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1215

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131332). Claimant filed a timely request for hearing. On July 9, 2014, ALJ Lohr conducted a hearing at which the employer did not appear and issued Hearing Decision 14-UI-211136, affirming the Department's decision. On July 16, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Sonic Drive In employed claimant from sometime in 2011 until January 5, 2014, and again employed claimant from February 11, 2014 until May 10, 2014. Claimant was last employed as a cook.

(2) During the first period that claimant worked for the employer, claimant was subject to racially derogatory treatment and racially motivated insults from a particular general manager. After the employer hired claimant again on February 11, 2014, the same general manager continued to use racially disparaging language when speaking with claimant, including making jokes about claimant's "black ass" and telling claimant such things as the "the sun won't shine on your black ass." Audio at ~10:35, ~21:15. Claimant told his supervisor that he disliked the way the general manager was treating him and the supervisor told claimant that he needed to speak up for himself. At some point after February 11, 2014, a person in the employer's upper management named "Brian" learned about the way the general manager was treating claimant. Brian worked for the employer at an out-of-town location and came to the workplace to address the general manager's treatment of claimant. Brian spoke to claimant, apologized for the behavior of the general manager and told claimant that the general manager

should not have been treating him that way. During that visit to the workplace, Brian discharged the general manager from employment for his treatment of claimant.

(3) At some later time after February 11, 2014, the employer hired a new general manager. The new general manager was friends with the prior general manager. The new general manager repeatedly referred to claimant not by his given name, but as "Sammy Davis, Jr." He would respond to various requests from claimant by stating "Okay, Sammy Davis, Jr." Audio at ~21:38. The new general manager also repeatedly referred to claimant as "Queen Latifah" and would make statements to claimant like "You need to have this [order] up here Queen Latifah." Audio at ~21:40. The new general manager also called claimant "a cheap whore." Audio at ~21:43. The other employees at the drive-in laughed the way the general manager referred to claimant. At times when claimant was working hard during his shift, the general manager would say things to him like "You're messing up today, ain't you" and "You ain't have it together today." Audio at ~ 19:00. Claimant concluded that he was being abused in the workplace.

(4) In late April or early May 2014, Brian came again to the workplace. Brian took claimant outside the workplace and, once again, apologized to him for the manner in which the new general manager was treating him. Audio at ~22:53. Brian told claimant that "he [Brian] don't appreciate what they doin' to me [claimant]" and that the employer did not allow such treatment. *Id.*; Audio at 24:30. Brian stated to the new general manager that "it's not right to do him [claimant] like that" and told the general manager to stop his behavior. *Id.* Brian then "got on all the managers [who] were giving off a bad vibe" and told them to stop that behavior as well. Audio at ~23:57.

(5) On May 10, 2014, when claimant was at work, the general manager whom Brian had earlier rebuked stated to claimant that he wanted to kill himself asked claimant for a gun to "put a bullet in his brain." Audio at ~27:20, ~ 27:35. Another manager was present and heard the general manager make this request of claimant. Audio at ~26:20. Claimant went home after his shift. Claimant did not ask the other manager who was present if that manager was concerned about the general manager's behavior or tell that manager that he was concerned about his future physical safety in the workplace when the general manager was present. Claimant did not report the incident or any concerns that he had as a result of it to his supervisor or Brian or any other representatives of the employer. Claimant did not return to the workplace after May 10, 2014 and voluntarily quit work that day.

(6) On May 12, 2014, two days after he quit work, claimant reported the general manager's behavior on May 10, 2014 to the local police and described the incident as involving a "suicidal subject." Exhibit 1 at 3. Claimant did not report that he feared that the general manager posed a physical threat in the workplace. After investigation, the police determined that claimant's report was "unfounded." *Id.*

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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

Claimant contended that he quit work because he was subjected to racial discrimination or racially disparaging treatment and because of fear that the general manager, if he obtained a gun, might "go postal" and shoot him. Audio at ~28:55, ~34:08. Claimant's description of the manner in which the general manager treated him in the workplace was unrebutted, and by its nature, raises serious concerns. However, claimant's testimony was that Brian had terminated the employment of the first general manager when he became aware of how that manager was treating claimant, and that Brian came again to the workplace when he was aware of how the second general manager was treating claimant, again apologized to claimant, and apparently in strong terms reassured claimant and rebuked the general manager as well as the other managers about such behavior. Audio at ~8:44, ~18:23, ~22:53, ~23:57, ~24:30, ~24:57. Based on Brian's actions, it is reasonable to infer that the employer not only did not condone the general manager's racial slurs, but took active and firm steps to stop them when it learned of them. Notably, claimant did not contend that he was subjected to racially disparaging treatment after Brian's second visit to the workplace. Accordingly, there is no basis to conclude that such treatment was ongoing when claimant made his decision to quit work or that it was, at that time, a grave reason for claimant to leave work rather than having been already dealt corrected by the employer. Claimant did not meet his burden to show, more likely than not, that racial disparaging treatment was good cause for him to leave work at the time that he did.

With respect to claimant's concerns about his personal safety in the workplace after the general manager asked him for a gun, claimant also did not demonstrate that it was good cause for him to quit work. There was nothing in claimant's interaction with the general manager, as claimant reported it, that could reasonably be interpreted as constituting a future physical threat to him. Moreover, if claimant was greatly concerned about his own physical safety if and when the general manager obtained a gun, he reasonably would have contacted the police immediately to protect himself, other employees and the employer's customers. That claimant did not do so until after he had already quit work, and then apparently reported the incident only as involving a possibly suicidal subject, most strongly suggests that claimant was trying to create, after the fact, a rationalization for his decision to leave work. Similarly, claimant's failure to raise any stated concerns about his personal safety in the workplace to the other manager who was present during his interaction with the general manager or to report the incident and his concerns to other representatives of the employer, when they had promptly and forcefully responded after receiving information about racially disparaging treatment, is telling evidence that claimant was not genuinely fearful. On the facts in this record, a reasonable and prudent employee who wanted to remain employed, exercising ordinary common sense, would not have quit work over concerns for his person safety before consulting with the police or representatives of the employer, including Brian, to determine whether his concerns were well founded and, if so, whether the employer or the police were going to take reasonable steps to ensure his safety in the workplace. Because claimant did not take the actions of a reasonable and prudent employee before he left work, he did not establish, more likely than not, that he had good cause to quit work when he did.

Claimant did not demonstrate that good cause existed at the time he left work. Claimant is disqualified from receiving unemployment insurance benefits

DECISION: Hearing Decision 14-UI-21136 is affirmed.

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

DATE of Service: August 19, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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