

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1242

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On June 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 93122). Claimant filed a timely request for hearing. On July 8, 2014, ALJ M. Davis conducted a hearing, and on July 9, 2014 issued Hearing Decision 14-UI-21117, affirming the Department's decision. On July 18, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which was interspersed with many new facts not presented at the hearing. Claimant did not explain why her argument contained information that was not a part of the hearing record, and did not show that factors or circumstances prevented her from offering that new information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). Because claimant did not satisfy the requirements of OAR 471-041-0090(2), EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Pilot Travel Centers, LLC employed claimant from September 7, 2010 until May 21, 2014. Claimant was first employed as a shift leader in the deli and was last employed as a cashier.

(2) Sometime before 2013, the employer began to question claimant's ability to perform her duties as a shift leader in the deli. Thereafter, the employer assigned claimant to various different tasks in the deli to give her more training in the skills she needed to perform adequately as a lead worker, including working as the morning coffee maker, baking and frosting sweet roll pastries and working as a cashier. Throughout this time, claimant continued to receive the pay rate for a deli shift leader position.

(3) When claimant worked as a shift leader in the deli, her duties included monitoring and recording twice per day the temperature of the employer's grill and freezer to ensure that food items were held at safe temperatures. During this time, the employer's general manager was notified at least two or three times per week that the temperatures in this equipment were fluctuating and that food safety violations might potentially occur. When he received such notices, it was the practice of the general manager to have the temperatures taken every half hour to determine if the temperature reading was a random fluctuation or indicated a consistent problem. If it was a problem, the general manager took the equipment out of service, discarded the food held in the equipment and called the employer's regional maintenance department to repair it. During the time she worked in the deli, claimant made several complaints to the general manager about the temperatures maintained in the grill and freezer and other potential food safety issues.

(4) In approximately late February or early March 2013, claimant called the employer's "alert line" to report that she thought the temperatures at which the employer's food was being maintained on the grill did not meet health standards and that she thought the employer was serving hot dogs that were past their product expiration date. Claimant's report was anonymously made. Approximately five days after claimant made this report, the employer issued to claimant a written warning for "unprofessional work." Transcript at 6. Shortly thereafter, in approximately March 2013, claimant again called the "alert line" and reported that she thought that the warning she had received was in retaliation for her earlier call to the "alert line." At around this time, claimant contacted the general manager's supervisor to determine if that supervisor was following up on the complaints she had made to the "alert line." The supervisor mentioned to claimant that he had assumed from the start that it was claimant who had called the "alert line" in February 2013. Claimant construed this comment as a confirmation that she had received the warning for "unprofessional work" as an act of retaliation.

(5) On December 20, 2013, the employer issued to claimant a disciplinary warning for her "continual" problems in maintaining a "consistent[ly] profitable [and] clean deli" and her failure to adequately perform the other tasks required of a deli shift leader. Transcript at 47. The warning stated that the employer had unsuccessfully coached claimant "several times" in the past on her performance as a shift leader and she seemed unable to handle the required tasks. Transcript at 48. The warning further stated that, in the future, claimant was going to be assigned to various tasks and duties as the employer determined appropriate. Transcript at 48. After December 2013, claimant did not function in a lead worker capacity or work in the deli. However, claimant continued to receive the pay of a shift leader.

(6) On approximately February 27, 2014, the general manager's supervisor decided that the employer could no longer pay claimant the wage of a shift leader since she was not performing at that level but was performing the work of a general crew member. Sometime soon after, the general manager's supervisor spoke to claimant. The supervisor told claimant that since she was not able to satisfactorily perform as a lead and had not been working as a lead since December 2013, she was being demoted to a cashier. The supervisor told claimant that the employer was going to reduce her hourly wage back to the level of a cashier.

(7) On or shortly before April 21, 2014, the owner of the scales on which the employer weighed vehicles notified claimant that the scales were not recording accurate weights. The owner instructed claimant to shut the scales down until the owner could repair them. However, one of the employer's customers

insisted that he wanted his vehicle weighed, even after the employer's general manager told him that the scales were not giving correct weights. The general manager could dissuade the customer from having his vehicle weighed. Despite the instructions of the scale owner, the general manager opened the scales to weigh this one customer's vehicle. On April 21, 2014, claimant called the Oregon Department of Weights and Measures to report that the employer was knowingly using an inaccurate scale to weigh vehicles.

(8) On approximately April 26, 2014, the employer implemented its decision to reduce claimant's pay to that of a cashier. Claimant's wage was reduced from approximately \$14 per hour to approximately \$11 per hour. Despite claimant's earlier conversation with the general manager's supervisor, claimant concluded that her pay was reduced in retaliation for her report to the Department of Weights and Measures.

(9) Sometime in approximately late April 2014, the employer issued to claimant a written warning for shortages in the cash drawer she was using. The warning stated that claimant did not normally have shortages and told claimant to "be careful" and try to avoid "easy mistakes." Transcript at 22. The warning did not impose any disciplinary sanctions. Claimant concluded that she was issued this warning in retaliation for her report to the Department of Weights and Measures.

(10) On May 12, 2014, claimant submitted a written resignation to the employer. The resignation stated that claimant was quitting as a result of the employer's "hostile and toxic [work] environment" directed at claimant. Transcript at 28. Claimant left work on May 21, 2014.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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.

Claimant testified that the "hostile and toxic" work environment that caused her to quit work included the general manager's "rudeness" to her, the general manager's actions that required her to violate various state standards for safe food and accurate weigh scales and the employer's supposed retaliatory actions against her in response to complaints she made to the employer about food safety matters and to the Oregon Department of Weights and Measures about the employer's inaccurate weigh scale. Transcript at 5, 6, 7, 8, 11-12, 13, 14, 15, 16-18. The employer's general manager disputed claimant's testimony point-by-point. Transcript at 20, 21, 22, 24, 25, 26, 30-34. In her written argument, claimant contended that her testimony on the relevant issues should be given greater weight than the general manager's since, at one point, the general manager appeared to contradict certain testimony he had given earlier that claimant had been involuntarily removed from her position in the deli. Written Argument at 4; *see and compare* Transcript at 25-27, 41. Although claimant asserted that, from this single

inconsistency, the general manager demonstrated a "propensity for untruthfulness" and a willingness to "alter his testimony if he thinks it will be beneficial to the employer," this inference is disproportionate. Written Argument at 4. Witnesses at hearing can unwittingly appear to answer questions in an inconsistent way, especially if they are on-guard and defensive when, as here, they are being cross-examined by an adverse party's attorney. Up to this single point of inconsistently, the testimony of the general manager was consistent and clear that claimant had not requested the reassignment, although he also testified that claimant had conceded she was not able to perform the work duties of a shift lead. Transcript at 25, 26, 30, 32, 33. It is quite plausible that the general manager's apparent inconsistency in testimony was based on his interpretation that, by conceding that she was unable to perform the duties of a shift lead, claimant had tacitly agreed to the employer's decision to remove her from the deli. Because any apparent inconsistency in the general manager testimony was minor and limited to a single answer over twenty-one pages of testimony, and there is a plausible innocent explanation for it, that inconsistency is not a reasonable ground to disregard his testimony in its entirety or to relieve claimant of the burden to prove that she left work for good cause. *See Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000).

With respect to claimant's contention that she left work because of the general manager's behavior toward her, it can be good cause to leave work when a claimant presents specific evidence showing that she was subjected to ongoing "oppression" or "abuse" in the workplace. *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). Although claimant generally characterized the general manager's behavior as "rude," "yelling," speaking "badly" to her in front of customers and making "nasty comments," she did not support these conclusions with specific evidence about what the general manager actually said or did to her. Transcript at 8, 9, 16. On this record, there is insufficient evidence to conclude that general manager's behavior met the standards in the decided cases to constitute good cause for claimant to leave work.

With respect to claimant's contention that she left work because the general manager condoned food safety violations and using an inaccurate weigh scale, claimant also has not met her burden to show that either ground was good cause for her to leave work. In connection with the scale, claimant generally contended that on one day in late April 2014 the general manager told her to keep the scales open after he knew they were inaccurate and required her to weigh "ten or twenty" vehicles using the inaccurate scales. Transcript at 12. However, at no point did claimant directly dispute the general manager's explanation that only one vehicle was actually weighed on the admittedly inaccurate scales and that was done only because the customer had insisted after being informed that the scales were inaccurate.

Transcript at 12, 20-21. Given the employer's rebuttal evidence, and claimant's apparent acquiescence to it, claimant did not meet her burden to demonstrate that a single use of an inaccurate weigh scale, at the insistence of a customer who was informed of that inaccuracy, was evidence of the employer's ongoing illegal activities or constituted good cause for her to leave work. In connection with the alleged issues surrounding food safety, claimant did not dispute the general manager's testimony that the temperatures in the employer's holding equipment fluctuated and that it was not an infrequent event for him to be notified that equipment needed adjustment or repairs to keep food at a safe temperature. Transcript at 22-24. The general manager disputed claimant's contention that he did not promptly call in the employer's maintenance personnel for repairs after he was notified of a problem and disputed that the employer sold unsafe or expired food. Transcript at 11, 13-14, 23-25, 38-39, 40. Claimant did not offer any reasons to explain why the general manager would not arrange to repair any malfunctioning food holding equipment and none are obvious to us as a matter of common sense. In addition, the timing of claimant's decision to quit suggests that issues about food quality did not actually form the basis for her decision since claimant apparently stopped working in the deli (and preparing food) five months before she decided to quit. As well, if claimant's concern about the safety of the employer's food was actually as great as she stated, she reasonably would have been expected to contact the local health department, particularly since she was aware that the health department had the authority to investigate the conditions in the deli and to close its operations. Transcript at 14. Claimant did not do so. Given the timing of claimant's decision to quit, claimant's failure to take certain logical actions, and the employer's rebuttal evidence, claimant did not meet her burden to show that her concerns over food quality actually motivated her to leave work, or that the alleged quality of the employer's food was an objectively a grave reason for her to leave work.

With respect to claimant's contention that the employer had taken retaliatory actions against her, claimant also did not show that this ground objectively constituted good cause for her to leave work. In connection with the late April 2014 warning for shortages in the cash drawer, claimant did not dispute that there were actual shortages in the drawer or that no disciplinary sanctions were associated with the warning. As described, the language of the warning was mild, rather than threatening. Transcript at 22. It is illogical that, if the employer was retaliating against claimant, it would not have used more stringent warning language and would not have taken any steps to penalize her for the supposed error. In connection with the allegedly retaliatory warning in February 2013 and the allegedly retaliatory pay reduction in April 2014, the only evidence that claimant presented to support retaliation was the timing of those actions closely coincided with formal complaints she had made. However, claimant did not appear to dispute that the employer was displeased with her performance as a lead worker in the deli as early as the beginning of 2013 and had been moving her from job-to-job in the deli to train her and to try to find a role for her. Claimant did not dispute that she received the December 20, 2013 warning relieving her of duties in the deli as a result of inadequate performance as a lead worker, nor did she contend that she was adequately performing those duties at that time. Claimant did not directly challenge the general manager's testimony that, shortly after February 27, 2014, his supervisor spoke to claimant and told her that she was going to be demoted to a cashier position due to her unsatisfactory performance as a lead worker and her pay would be reduced accordingly. Transcript at 25-27, 33-34, 47-48. Given the employer's evidence and its un rebutted explanation of the context in which its actions were taken, claimant did not show, more likely than not, that the warnings and the pay reduction were acts of retaliation rather than neutral business decisions undertaken in response to claimant's job performance. Claimant did not demonstrate the employer's retaliatory motives or that the employer's alleged retaliation was good cause for her to leave work when she did.

None of the several grounds that claimant raised for leaving work constituted, more likely than not, good cause to quit work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-21117 is affirmed.

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

DATE of Service: August 21, 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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