

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1819

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 135539). Claimant filed a timely request for hearing. On November 6, 2014, ALJ Clink conducted a hearing in which the employer did not participate, and on November 19, 2014, issued Hearing Decision 14-UI-28919, affirming the administrative decision. On November 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) River Hawk Boats employed claimant as an office manager from July 5, 2011 to September 23, 2014. The employer's two owners are brothers.

(2) In February 2014, claimant became extremely stressed by her work because one of the employer's owners, who directly supervised claimant's work, had repeatedly required her to engage in illegal transactions. Claimant consulted a doctor about the stress she was experiencing; the doctor suggested that she find another job. Claimant hoped that her work environment would improve, however, and did not begin looking for other work.

(3) Also in February 2014, claimant spoke with her supervisor and the employer's two owners and told them that she could no longer participate in illegal transactions. The owners agreed, and claimant was no longer required to participate in these transactions. The owner who did not supervise claimant told her that if the other owner required her to do anything illegal, she should tell him and he would end the illegal activity.

(3) On August 29, 2014, claimant talked with her newly-hired assistant about the employer's warranty program. Claimant's supervisor wanted the assistant to process warranties, but the assistant did not want to do so and threatened to quit if she was required to handle warranties. Claimant planned to talk with her supervisor about the warranty program on September 2, and was apprehensive about this discussion. Claimant was worried that her supervisor would become angry when he learned that the assistant was unwilling to accept the work he wanted to assign her. Claimant knew that her supervisor had difficulty controlling his anger. Claimant spoke with the employer's owner who did not supervise her and told him she was nervous about the discussion she planned to have with her supervisor on September 2. The owner told claimant to do her job and not to worry.

(4) On September 2, 2014, claimant came to work early, went to her supervisor's office, and attempted to talk with him about the warranty program. Claimant's supervisor, who is a former professional football player and very large, and who has a loud, booming voice, became angry and began screaming at claimant. The supervisor was incoherent; claimant could not understand what he was saying or why he was upset. Claimant was intimidated by her supervisor's behavior, and fearful that he would physically harm her. As soon as she was able, claimant returned to her office, locked the door, and wrote a letter of resignation, which she immediately submitted to the employer. In the letter, claimant told the employer that her last day of work would be October 2, 2014. Although she was fearful of continuing to work for the employer because of her supervisor's angry, erratic behavior, claimant wanted sufficient time to train her replacement.

(5) On or about September 4, 2014, claimant's supervisor came to her office, put his hands on claimant's shoulders and attempted to apologize for his behavior on September 2. Claimant told him that she thought he was bipolar.

(6) On September 15, 2014, claimant consulted a doctor about anxiety she was experiencing as a result of the September 2 incident. The doctor diagnosed her with Post-Traumatic Stress Disorder (PTSD) and prescribed medication, which claimant was taking on the date of the hearing.

(7) After she submitted her resignation, claimant attempted to avoid being alone with her supervisor. Her supervisor, however, repeatedly tried to speak to claimant alone in his office, and blocked the door if she attempted to leave. Claimant was intimidated and frightened by these behaviors.

(6) On September 23, 2014, claimant told her supervisor that he was engaging in an illegally discriminatory hiring practice. The supervisor became angry and discharged claimant.

CONCLUSIONS AND REASON: We disagree with the ALJ and conclude that claimant was discharged, not for misconduct.

In Hearing Decision 14-UI-28919, the ALJ determined that the provisions of ORS 657.176(8) applied to claimant's work separation. ORS 657.178(8) provides:

For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that:

(a) The voluntary leaving would be for reasons that do not constitute good cause;

- (b) The employer discharged the individual, but not for misconduct connected with work, prior to the date of the planned voluntary leaving; and
- (c) The actual discharge occurred no more than 15 days prior to the planned voluntary leaving, then the separation from work shall be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

The ALJ concluded that claimant planned to voluntarily leave work, but did not have good cause to do so, and that the employer discharged claimant, but not for misconduct, within 15 days of the date on which she planned to leave. Applying the provisions of ORS 657.178(8), the ALJ determined that claimant was disqualified from benefits, effective September 28, 2014, until requalified under Department law. We disagree with the ALJ's conclusion because we conclude that claimant had good cause for her planned voluntary leaving.

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 quit her job because of the behavior of her direct supervisor, one of the employer's two owners. Claimant objected to her supervisor's insistence that she participate in illegal activities, participation that supposedly ended in February 2014; the supervisor's insistence caused claimant enough anxiety that she consulted a doctor, who suggested she find another job. The statement of the employer's second owner – that claimant should tell him if she was ever again asked to do anything illegal – indicates the possibility that claimant might again be required to engage in illegal activities. Claimant was also frightened by her supervisor's angry outburst on September 2, 2014. After this outburst, claimant again sought medical treatment for anxiety, and was diagnosed with PTSD, a condition from which she continues to suffer. No reasonable and prudent person would endure the type of abusive behavior in which claimant's supervisor engaged, behavior that affected claimant's mental condition to such an extent that she required medical treatment and medication. *See McPherson v. Employment Division*, 285 Or 541, 557, 591 P2d 1381 (1979) (a claimant is 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 unemployment benefits). *See also Pamela Latham* (Employment Appeals Board, 11-AB-3308, December 22, 2011) and *Kathryn A. Johnson* (Employment Appeals Board, 11-AB-2272, September 6, 2011) (supervisors' fits of temper and verbal abuse created good cause for voluntarily leaving work).

The ALJ, however, asserted that claimant had the reasonable alternative of meeting with her supervisor and the employer's other owner "in an attempt to resolve the behavioral issue prior to leaving work." Hearing Decision 14-UI-28919 at 6. Given the angry and unprovoked outburst of claimant's supervisor

on September 2, and his intimidating behaviors toward claimant after that date, we find that any attempt by claimant to discuss the supervisor's "behavioral issue" with him would have been futile. The employer's other owner (who was the brother of claimant's supervisor) had shown little willingness to help claimant deal with his brother's anger. When claimant told him that she was nervous about her September 2 discussion, the owner offered no meaningful assistance, other than telling claimant not to worry.

For the reasons stated above, we conclude that claimant faced a grave situation that left her with no alternative but to quit her job. Because claimant had good cause for her planned voluntary leaving, the provisions of ORS 657.178(8) do not apply. Instead, we now consider the reasons why the employer discharged claimant on September 23, 2014 under ORS 657.176(2)(a), which requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest.

The employer discharged claimant because her supervisor was angry that she told him he had engaged in an illegally discriminatory hiring practice. Informing her supervisor about an illegal activity is not a willful or wantonly negligent violation of standards of behavior that an employer can rightfully expect its employees to meet. To the contrary, an employer has the right to expect that its employees will not only comply with the law, but also ensure that other employees do so.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits.

DECISION: Hearing Decision 14-UI-28919 is set aside, as outlined above.

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

DATE of Service: January 9, 2015

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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