

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1950

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100414). Claimant filed a timely request for hearing. On December 8, 2014, ALJ Triana conducted a hearing, and on December 10, 2014 issued Hearing Decision 14-UI-30137, affirming the Department's decision. On December 24, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) U.S. Department of Agriculture employer claimant as an equal opportunity assistant in the Forest Service from September 20, 2010 until September 15, 2014.

(2) From 1998 until 2002 and from 2005 until 2006, claimant served on active duty with the U.S. Army. In 2006, the Department of Veteran's Affairs (VA) evaluated claimant as 20 percent disabled due to service-connected chronic lumbar strain. In 2008, the VA evaluated claimant as 50 percent disabled due to service connected post-traumatic stress disorder (PTSD). Claimant's combined disability rating from both conditions was 60 percent.

(3) In approximately October 2013, one of claimant's coworkers assumed the position of acting civil rights director and became claimant's immediate supervisor. Claimant and this supervisor had a poor working relationship. The supervisor often "yelled" at claimant and insulted him. Transcript at 14. The supervisor criticized and "belittled" claimant in front of his coworkers. Transcript at 14, 18. The supervisor also regularly assigned tasks to claimant with such tight deadlines that he was unable to timely complete them. When claimant did not complete those or any other tasks, the supervisor

regularly threatened to issue disciplinary warnings to claimant for insubordination or for an intentional refusal to follow instructions. Transcript at 18. Claimant thought that the supervisor's "constant attacks," and her treatment of him, were "unbearable" and degrading. Transcript at 14. Although claimant tried to discuss these issues with his supervisor, she did not change her behavior.

(4) In November 2013, claimant met with the deputy regional forester, who supervised claimant's supervisor. Claimant told the deputy regional forester that his immediate supervisor was treating him unfairly and that she was creating an intolerable working environment for him. Claimant described to the deputy regional forester the specific actions of his supervisor that were objectionable to him. The deputy regional forester suggested that claimant try to mediate with his supervisor to resolve his concerns. The deputy regional forester did not investigate to determine whether claimant's complaints were well-founded.

(5) Sometime after November 2013, claimant contacted the employer's employee relations department to complain about his supervisor. He asked a representative in that department to advise him on how he might better deal with his supervisor. Claimant also asked a union representative for similar assistance. Neither representative was helpful. Claimant's supervisor's behavior continued unchanged

(6) On January 28, 2014, claimant's supervisor issued a letter of reprimand to claimant for various alleged offenses, including failing either to perform assigned tasks or to timely complete them; taking notes that "lacked professionalism, were inaccurate and included misspellings;" failing to submit timesheets; and submitting an expenditure sheet that had errors. Exhibit 1 at 4.

(7) In March 2014, claimant again met with the deputy regional forester to discuss his complaints about his immediate supervisor's behavior and the manner in which she treated him. The deputy regional forester again advised claimant to pursue a formal mediation with his supervisor to resolve his concerns. Claimant contacted the employer's conflict management prevention department to arrange for mediation. When an independent mediator was appointed, claimant contacted the mediator and informed the mediator of his concerns. Claimant also told the mediator that he experienced PTSD, which affected him in his dealings with his supervisor. Transcript at 37.

(8) On April 4, 2014, claimant and his immediate supervisor met with the mediator and claimant understood that they were going to attempt to resolve their differences. In the mediation, claimant "left everything on the table" and explained in detail the supervisor's behavior that he considered intolerable. Transcript at 21. Claimant's supervisor did not say anything during the mediation session in response to claimant's statements. At the conclusion of this first mediation session, the mediator stated that he needed to continue meeting with both claimant and his supervisor to try to resolve their issues. The mediator tentatively scheduled the second mediation session for May 21, 2014. The mediator's report from the first session stated that both parties had "poor communication styles." Transcript at 21. After the first mediation session, claimant's supervisor's behavior toward claimant did not change.

(9) In April 2014 and May 2014, claimant thought that he was on a "maxi-flex," schedule and allowed to flex the ending time of his shift to take account of any minor tardiness in his work arrival due to public transportation delays or other difficulties. Transcript at 43, 49. On May 19, 2014, claimant's supervisor rejected the time card that claimant had submitted for the prior pay period. The supervisor notified claimant that she had declined to approve his time card because he was no longer on a flex time

schedule, but on a "fixed" one, which meant that his late arrivals needed to be accounted for on his timecard as time away from work without leave (AWOL)." Exhibit 4 at 9. This was the first occasion that claimant was informed he was no longer on a "maxi-flex" schedule. Transcript at 41, 43, 49. The supervisor frequently allowed employees other than claimant to flex their ending time to take account of tardy arrivals to work. Transcript at 41. Around this same time, claimant's supervisor also told claimant that he no longer had the option of telecommuting to work. Transcript at 43. Sometime before May 21, 2014, claimant's supervisor cancelled the mediation session scheduled for May 21, 2014, stating that it conflicted with other appointment that she had scheduled.

(10) Sometime before May 30, 2014, claimant's supervisor spoke with claimant and told him that she was preparing a letter that was going to recommend his suspension from work for various alleged disciplinary infractions. When she discussed the letter that she proposed to write, claimant's supervisor yelled at him and, in apparent reference to that letter, stated, "You're not gonna win this one." Transcript at 18, 32, 45.

(11) On May 30, 2014, claimant's supervisor issued to him a notice of proposed disciplinary suspension for lack of candor in the manner that he had coded his time on one timesheet in March 2014; his failure to follow instructions for not completing certain tasks or not completing them on time; for not submitting one timecard in February 2014 on the day that it was due; for being AWOL for brief periods on four days when he was tardy in arriving for work between 15 minutes and 30 minutes. Exhibit 1 at 9-10. The letter proposed a 14 day suspension for those infractions. The letter advised claimant he could submit an oral or written reply to the specified infractions to the deputy regional forester. Sometime around May 30, 2014, claimant's supervisor informed him that the employer considered the manner in which he had coded some of his time on the cited timesheets to have been dishonest and fraudulent.

(12) After May 30, 2014, claimant attempted to work with the mediator and the deputy regional forester to arrange for additional mediation sessions needed to continue the mediation that was started on April 4, 2014. Claimant was not able to coordinate those additional sessions with his supervisor's existing schedule. Claimant sent emails to the mediator informing him that, despite his attempts, he was unable to find a time for continuing the mediation that was consistent with his supervisor's calendared appointments. Claimant contacted the deputy regional forester to inform her of these difficulties and the urgency he felt to continue mediating with his immediate supervisor. The deputy regional forester told claimant to work with her secretary to determine an acceptable scheduling for additional mediation sessions. Claimant tried many times, but was unable to do so. Claimant contacted the employer's national civil rights director to determine whether he would intervene to assist in scheduling follow-up mediation sessions. The civil rights director told claimant he was going to speak with claimant's supervisor or the deputy regional forester about the need to cooperate in scheduling a continuation of the mediation between claimant and his supervisor. Transcript at 27. Throughout this time, the behavior that claimant considered harassment by his immediate supervisor continued. Claimant experienced emotional difficulties at work and at home, which he attributed to his supervisor's treatment of him.

(13) On June 30, 2014, claimant had an appointment with a physician at the VA. The physician stated in claimant's progress notes that claimant had PTSD, depression and an anxiety disorder. The physician noted that claimant was having sleep problems that he attributed to the new supervisor and the attempts to mediate with her. The physician recommended that claimant follow up with mental health treatment. Exhibit 2 at 13.

(14) After June 30, 2014, claimant was still unable to arrange for another mediation session that his supervisor could attend. Claimant perceived that his supervisor was continuing in her harassment of him. Claimant did not know what to do.

(15) On July 8, 2014, claimant gave an oral response to the proposed notice of suspension to the deputy regional forester. Exhibit 1 at 18. On July 11, 2014, claimant submitted a written response. *Id.* On both, claimant stated that his supervisor's behavior unfairly singled him out for criticism and disciplinary actions and that he was being harassed. The deputy regional forester did not investigate the legitimacy of claimant's complaints because the employer did not consider a proposed suspension as an adverse personnel action. Transcript at 62. On August 21, 2014, the deputy regional forester issued a notice of decision on proposed suspension in which she concluded that a 14 day suspension was warranted and it was scheduled to start on September 8, 2014. The notice of decision did not state that the deputy regional forester, or any other employer representative had independently investigated the merits of claimant's complaints when she was making her decision. Exhibit 1 at 18-19; Transcript at 62, 65. No such investigation was ever undertaken. Transcript at 65.

(16) After August 21, 2014, claimant contacted the employer's employee relations department to try to determine how to respond to the suspension. Transcript at 34. Claimant was convinced that having a suspension as part of his employment history with the employer, a federal governmental agency, would effectively eliminate his future chances for hire by another federal agency if he left his existing employment due to his supervisor's treatment of him or for any other reason. Transcript at 13, 26. When claimant spoke with a representative from the employee relations department, the representative explained that the nature of the charges underlying the suspension could be considered "fraud or mismanagement." Transcript at 28. The representative told claimant that the suspension was going to happen if he did not resign and that it was going to become a permanent part of his employment record. Transcript at 34. The representative did not state disagreement with claimant's belief that a permanent record of his suspension would "follow" him and "every federal agency" to which he applied in the future would view it negatively." Transcript at 35.

(17) After August 21, 2014, claimant was still unable to arrange for a continuation of his mediation with his immediate supervisor. Around this same time, claimant contacted the national civil rights director to try to determine his options. The national civil rights director told claimant that, if he wanted, he might file a complaint with the Equal Employment Opportunity Commission (EEOC) based on the alleged manner in which his supervisor had treated him. Transcript at 9. August 25, 2014, claimant contacted the EEOC to inquire into how he could file an EEOC complaint based on his immediate supervisor's alleged harassment. Exhibit 2 at 2.

(18) Sometime around August 27, 2014, the employer provided an alternative disciplinary agreement to claimant, which stated that the employer agreed to reduce the proposed suspension from 14 days to 3 days and in which claimant admitted to the "misconduct" specified in the May 30, 2014 notice of proposed suspension. A representative from the employer's employee relations department told claimant at that time that, if he did not sign the alternative disciplinary agreement and accept that 3 day suspension, the 14 day suspension would "automatically" imposed. Transcript at 34, 35. The representative advised claimant that even if he agreed to the 3 day suspension, that suspension was going to appear permanently in his employment record. Transcript at 34. On August 27, 2014, claimant

signed the alternative disciplinary agreement. At the time that he signed the agreement, claimant felt extreme pressure to do so and he was "really stressed out." Transcript at 10. Sometime around August 27, 2014, the employee relations department representative told claimant that if he resigned, the 3 day suspension would not appear in his employment record. Transcript at 30.

(19) On approximately September 7, 2014, claimant contacted the deputy regional forester about possibly resigning, and his continued inability to arrange a continuation of the mediation with his immediate supervisor. Sometime between approximately September 9 and 12, 2014, claimant called the national civil rights director to discuss his possible resignation. The national civil rights director told claimant that he would speak with the deputy regional forester, and that he wanted claimant to arrange to meet with the deputy regional forester and the regional forester before he made any decision to resign.

(20) By September 15, 2014, claimant's situation with his supervisor had not changed and he thought that he needed to work with a different supervisor. On that day, claimant told the deputy regional forester that he was requesting to move to a different department because the situation with his immediate supervisor was "very hostile," and he was "stressed out" by his supervisor's behavior and the lack of success in continuing the mediation. Transcript at 10. The deputy regional forester did not approve claimant's transfer. The deputy regional forester told claimant that he should arrange a meeting with the regional forester, where they all could discuss claimant's concerns. Claimant tried on that day to arrange the meeting with the regional forester that the deputy regional forester had requested, but learned from the regional forester's secretary that the regional forester was going to be out of the office for the next two or three week. Claimant then tried to meet with a representative from the employee relations department for assistance. Claimant was unable to locate a representative in the office. At this time, claimant's emotions were "at my breaking point." Transcript at 11.

(21) On September 15, 2014, claimant submitted his resignation effective at the end of the working day. As his reasons for quitting, claimant cited a hostile work environment as well and the fact that if he did not resign, a suspension was going to appear permanently on his official personnel folder. Exhibit 1 at 25.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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). It is not good cause if a claimant leaves work to avoid what would otherwise be discharge for misconduct or a potential discharge for misconduct. The standard for showing good cause is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 722 (2010). Claimant had PTSD and chronic lumbar strain, are permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairments would have continued to work for his employer for an additional period of time.

In Hearing Decision 14-UI-30137, the ALJ found that claimant left work to avoid the effects of an upcoming work suspension on his future employment prospects. Hearing Decision 14-UI-30137 at 4. The ALJ concluded that claimant did not show good cause for leaving work for this reason, reasoning that a reasonable and prudent person with PTSD and chronic lumbar strain would not have objectively considered it a sufficiently grave reason to quit. Hearing Decision 14-UI-30137 at 4. Alternatively, the ALJ also concluded that a reasonable and prudent person with PTSD would not have decided to leave work before he had pursued the alternative of an arbitration or EEOC complaint. Hearing Decision 14-UI-30137 at 4. We disagree.

Although at one point during his hearing testimony claimant testified that he left work was to avoid the imposition of the three day suspension, at other times he stated that he left work because of the manner in which he supervisor treated him. Transcript at 14, 30, 45. In addition to describing his concerns over the upcoming suspension when he made the decision to resign, claimant testified extensively about the emotional effects of his supervisor's treatment of him, the hostility he experienced in the workplace, and the workplace environment he considered unbearable at the time he decided to quit work. Transcript at 14, 15, 18, 20. Viewed as a whole and fairly considered, the record demonstrates that claimant quit work for some combination of both reasons – the suspension and his perception that his supervisor was continuously and unfairly harassing him.

While claimant contended at hearing that his supervisor engaged in a pattern of behavior that oppressed him and unfairly harassed him, the employer chose at hearing, to the ALJ's apparent surprise, not to call any witnesses who might have rebutted these claims or the purported facts on which they were based, including claimant's immediate supervisor, the deputy regional forester and any other fact witnesses to whom claimant referred in his testimony. Transcript at 57, 58. As described in claimant's un rebutted testimony, he made a *prima facie* showing that the manner in which his supervisor treated him was inappropriate and arguably intended to harass him. Significantly, the employer did not present any evidence demonstrating that the infractions underlying the January 28, 2014 reprimand or the May 30, 2014 notice of proposed suspension were based on circumstances other those described by claimant, or that the disciplinary measures were neutrally imposed. The alleged infractions, as described in the relevant exhibits, appear more or less minor and, absent additional evidence from the employer, are susceptible of an interpretation that is consistent with claimant's innocent explanations. Exhibit 1 at 4, 18. Moreover, claimant's implicit claim that his supervisor elevated the alleged infractions to disciplinary violations only to harass him is given credence by the fact that the employer did not present any evidence that claimant was ever warned about such behaviors at the time they had supposedly occurred and when the employer presumably was first aware of them. Rather, the behaviors for which claimant was sanctioned surfaced only in the reprimand or proposed suspension some months after they allegedly occurred. Exhibit 1 at 4, 18. Notably, the employer did not contend that any employer representatives had investigated to determine whether claimant's complaints about his supervisor's alleged harassment of him were justified, and the employer's sole witness at hearing was unable to identify any such representatives who might have conducted an investigation. Transcript at 62, 65. Although the employer attempted to argue at hearing that claimant made a binding admission that he engaged in such misconduct when he signed the alternate disciplinary agreement, the employer did not attempt to rebut claimant's testimony that he signed the agreement "under duress" and when he was "at the breaking point." Transcript at 11, 14, 54. Under these circumstances, it cannot be concluded that claimant's signature on the alternative disciplinary agreement establishes that he knowingly or voluntarily agreed that he had engaged in misconduct involving the specified infractions.

As well, the symptoms of PTSD which claimant experienced are commonly known to include severe emotional distress to perceived tangible or intangible threats, extreme vigilance, distorted perceptions, irritation, aggressive reactions and hopelessness about the future. <http://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/basics/symptoms/con20022540>. Based on these recognized qualities, we reasonably infer that claimant was gravely affected by how he perceived his supervisor's treatment of him, and likely was at a loss when he was unable to arrange for a continued mediation to resolve his difficulties with his supervisor. On these facts, a reasonable and prudent person with PTSD, exercising ordinary common sense, would have concluded that his supervisor's perceived treatment was a grave reason to leave work. While the ALJ concluded that claimant had the reasonable alternatives of seeking an arbitration to resolve his difficulties with his supervisor or to file an EEOC complaint, the reasonableness of these options are belied by the circumstances. Claimant had already tried repeatedly to mediate his concerns with his supervisor and was unable alone or with the assistance of the deputy regional forester, the director of the civil rights department or the employee relations department to arrange to continue that mediation beyond a single session. Claimant had filed complaints against his supervisor which were not investigated. When the employer's managers did not follow-up to require his supervisor's continued participation in mediation, a reasonable and prudent person with PTSD, exercising ordinary common sense, who had exaggerated perceptions of danger and who likely experienced hopelessness, would have concluded that further efforts to compel a resolution of his difficulties with his immediate supervisor were futile.

To the extent that claimant also quit work to avoid having a work-related suspension on his record, that reason was also good cause for him to leave work under the circumstances. The employer did not present any specific evidence to demonstrate that claimant actually engaged in the conduct on which the suspension was based, and did not present any evidence to rebut claimant's explanations of the behaviors. His explanations did not involve the type of mental state required to demonstrate willful or wantonly negligent misconduct. *See generally* OAR 471-030-0038(5)(b)(F) (it is not good cause to quit to avoid a discharge for misconduct and, by inference, to avoid a suspension for misconduct). Significantly, the employer did not attempt to refute claimant's testimony about the long-range stigmatizing career effects the suspension would have had on his future career prospects. In the absence of rebuttal evidence, claimant's testimony was not implausible and it is therefore accepted. On these facts, a reasonable and prudent person with PTSD, exercising ordinary common sense, would have concluded that the negative impacts of having a suspension on his employment record, constituted a grave situation that left him no alternative but to leave work when he did.

Claimant demonstrated that he had good cause to leave work when he did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-30137 is set aside, as outlined above.

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

DATE of Service: February 24, 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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