

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0061

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 115835). Claimant filed a timely request for hearing. On January 13, 2015, ALJ Wiperman conducted a hearing, and on January 16, 2015 issued Hearing Decision 15-UI-32003, affirming the Department's decision. On January 21, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Dave & Busters Management Corporation, Inc. employed claimant from October 13, 2014 to November 12, 2014 as a part time cook.

(2) From 2008 through the end of her employment, claimant had fibromyalgia. Claimant controlled her fibromyalgia with medication, and had increased pain from it when she was unable to take her medication during her shift. Claimant needed breaks to take her medication with food.

(3) On November 3, 2014, claimant began training for the cook position. Claimant began work at 8:00 a.m., and asked her trainer at 1:30 p.m. if she could take a break. Her trainer told her there was no time for breaks. Claimant told her manager she needed breaks to take medication. The manager affirmed that claimant was entitled to breaks, but told claimant she had to complain about her lack of breaks to her trainer. The trainer continued to deny claimant breaks. From November 3, 2014 to November 12, 2014, claimant worked shifts of eight or nine hours with no breaks.

(4) On November 6, 2014, the employer began having the cook trainees perform mock cooking assignments. Claimant's supervisor yelled and used foul language toward claimant and her coworkers each day during the training. Claimant complained to her trainer about how the supervisor spoke to the employees. The trainer told claimant, "That's how we get you guys moving." Audio Record at 13:24 to 13:40. The trainer did not indicate he would pursue the complaint further.

(5) On November 12, 2014, claimant was preparing plates for food. Her supervisor told her, “Get your fucking head out of your ass.” Audio Record at 11:37 to 11:49. Claimant’s trainer heard the statement, and asked claimant to perform a different task. Claimant began to perform the task. Her supervisor approached her again and said, “Are you fucking stupid? That’s not how you do it.” Audio Record at 12:32 to 12:43.

(6) On November 12, 2014, claimant quit work because the employer did not permit her to take rest or lunch breaks, and the supervisor yelled and used foul language toward her.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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 P2d 722 (2010). Claimant had fibromyalgia, a permanent or long-term “physical impairment” as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

Claimant quit work because the employer did not provide her with rest and lunch breaks, and because her supervisor consistently yelled and used foul language toward the employees, and, on November 12, 2014, singled claimant out for mistreatment. In Hearing Decision 15-UI-32003, the ALJ concluded claimant quit work without good cause, reasoning that claimant had reasonable alternatives to leaving work because claimant’s manager had affirmed that claimant was permitted to take breaks.¹ However, the record shows that, when claimant complained to her manager about the lack of breaks, the manager told her to complain to her trainer, who continued to deny claimant’s meal and rest periods. The record fails to show claimant was aware of any other resource to which she could complain that would not have been as futile as her complaints to the manager and trainer.

The employer was required to provide claimant, for each shift of six or more hours, a 30-minute meal period during which claimant was relieved of all duties, and a 10-minute rest period for each four hours claimant worked. OAR 839-020-0050(2)(a), (6)(a). The record does not show the employer was exempt from the rest and meal period requirements or that providing claimant with an uninterrupted meal period would impose an undue hardship on the operation of the employer’s business. See ORS 653.020, OAR 839-020-0050. Claimant had fibromyalgia. The lack of breaks prevented claimant from taking her medication and caused her to experience additional pain. No reasonable and prudent person with claimant’s impairment would have continued working indefinitely for an employer who failed on an ongoing basis to provide her with rest and meal periods in accordance with state law, particularly when the employer’s failure to provide breaks impaired her health. *Accord J. Clancy Bedspreads and*

¹ Hearing Decision 15-UI-32003 at 2.

Draperies v. Wheeler, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when a wage dispute was ongoing); *compare Marian Estates v. Employment Department*, 158 Or App 630, 976 P2d 71 (1999) (where wage dispute is not ongoing, and only the issue of back pay restitution continues to exist, claimant did not have good cause to quit work).

Although claimant's supervisor openly yelled and used foul language toward claimant, the record lacks any evidence that the employer attempted to correct the supervisor's behavior. Nor does the record show that additional complaints to the employer about the supervisor's behavior would have improved claimant's working conditions. When claimant complained to her trainer about the supervisor's conduct, the trainer's statement showed he condoned the conduct, and would not address the complaint. Therefore, the record shows that, more likely than not, additional complaints about the supervisor's behavior would have been futile. A reasonable and prudent person offended by what amounted to ongoing verbal abuse by a supervisor would not continue working an additional period of time for an employer that condoned the abusive conduct.

For those reasons, it is more likely than not on this record that a reasonable and prudent person with fibromyalgia would have no reasonable alternative but to quit work. Thus, claimant quit work for good cause and is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 15-UI-32003 is set aside, as outlined above.²

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

DATE of Service: March 04, 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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² 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.