

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0104

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 15, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 74650). Claimant filed a timely request for hearing. On January 27, 2015, ALJ Holmes-Swanson conducted a hearing, and on January 30, 2015 issued Hearing Decision 15-UI-32653, affirming the Department's decision. On February 3, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Whole Foods Market employed claimant as a team member in its bakery department from February 23, 2012 until November 3, 2014.

(2) Sometime before the end of July 2014, claimant learned that her bakery team members and the assistant store leader suspected one of her regular customers of using fraudulently obtained credit cards to pay for the items that he routinely purchased from claimant. Claimant also learned that the team members and the assistant store leader were placing that customer under surveillance when he was in the store and taking pictures of him. After claimant told the assistant store leader that she did not think the customer was engaging in any fraud and that the surveillance of him made her "uncomfortable," the surveillance of the customer continued. Transcript at 21. Claimant told the customer that he was being watched when he was in the store so that he would be aware of it.

(3) Sometime before the end of July 2014, claimant's former roommate, who was also a bakery team member, was admitted to a hospital for surgery and then transferred to that hospital's intensive care unit after some complications arose. Claimant thought the complications were the result of the bakery team member not taking care of herself and drinking excessively in the weeks preceding her surgery. When one of claimant's other team members stated that the team should "have some compassion" for the hospitalized team member, claimant stated that she did not have any "compassion" for that team member

because "she didn't take care of herself." Transcript at 22. The coworker to whom claimant made this comment reported to the team leadership that it had "offended" her. Transcript at 22.

(4) Sometime before the end of July 2014, the store leader told claimant that her boyfriend, who regularly came to the store to have lunch with claimant, was a "distraction" to claimant and the other team members when he was in the store waiting for claimant's lunch break to start. Transcript at 24, 25. The store leader told claimant that her boyfriend was spending too much time in the store and that claimant needed to inform her boyfriend that "he needs to limit his time in the store." Transcript at 25. Claimant disagreed with the store leader about the amount of time her boyfriend was in the store.

(5) At the end of July 2014, the store leader and the assistant store leader met with claimant to discuss issues they had with claimant's behavior at work. The assistant store leader told claimant that claimant should not have told her regular customer that he was under surveillance when he was in the store. The assistant store leader told claimant "under no circumstances" was she ever to tell a customer "what is going on inside the store." Transcript at 22. Claimant thought that, by this comment, the assistant store leader was harassing her and unfairly trying to control behavior. The assistant store leader also told claimant, in reference to the comment that she had made to one team member about her lack of compassion towards the hospitalized team member, that the team member had been offended by that comment. The assistant team leader advised claimant that she needed to have "compassion for team members," should not "say things like that" about her coworkers because such comments created a "poisonous and toxic [work] environment." Transcript at 22. Claimant thought that, by this comment, the assistant store leader was trying to control her opinions. At this meeting, the store leader again brought up his displeasure at the amount of time claimant's boyfriend was in the store. When claimant disagreed with the basis for the store leader's opinion, the store leader told claimant, "I'd rather lose him [claimant's boyfriend] as a [customer] than you as a team member." Transcript at 25. Claimant thought that the store manager was harassing and intimidating her by threatening her discharge.

(6) On August 26, 2014, claimant met with certain members of the store leadership for her performance review. During the review, claimant emphasized her accomplishments during the past performance year and stressed her "positive points." Transcript at 36. When claimant was done, the assistant store leader told claimant that what she had presented was her "ego talking" and that her opinion of herself was "false." Transcript at 36. Claimant thought that the assistant store leader was not accurately evaluating her performance and was harassing her.

(7) On approximately September 17, 2014, claimant complained to the employer about harassment and intimidation from the store leadership. Claimant told the employer that she was experiencing physical and mental health issues due this treatment and that she was unable to work. On September 17, 2014, the employer authorized a paid administrative leave for claimant while it investigated claimant's harassment claims. Claimant was aware that when this administrative leave terminated she would need to have approval for continued leave under the Family Medical Leave Act (FMLA) or be required to return to work.

(8) On September 25, 2014, claimant saw a physician's assistant for the purposes of having that provider complete an authorization for a FMLA leave that she could give to the employer. At that time, claimant had not been examined or treated by any health care providers for any physical or mental health conditions, and did not have a primary care physician. Claimant told the physician's assistant that she

was experiencing physical symptoms, including nausea, disrupted sleep and stress-induced TMJ, as a result of anxiety arising from the manner in which she was being treated at work. The physician's assistant refused to complete the FMLA authorization for claimant, stating that she did not have a sufficient treatment history with claimant or the expertise to evaluate her mental health. The physician's assistant referred claimant to a psychologist for the evaluation necessary to complete the FMLA authorization based on her emotional state. Claimant did not follow up on the referral.

(9) On approximately October 2, 2014, the office of the psychologist to whom the physician's assistant had referred claimant called claimant to arrange for an appointment to evaluate her for purposes of completing the FMLA authorization. The psychologist's office told claimant that the psychologist's first available appointment for an evaluation was on October 22, 2014. Claimant did not make an appointment with the psychologist. Sometime after October 2, 2014, claimant contacted the offices of two other mental health providers to arrange for appointments. Those health care providers did not have available appointments until sometime in November 2014, after the time that claimant anticipated the employer's investigation would have concluded and when she would need the FMLA authorization. Claimant did not make any appointments with these providers.

(10) On October 9, 2014, the members of the leadership team that had been assigned to investigate claimant's complaints of harassment met with claimant to inform her of their conclusions. After interviewing claimant, the other bakery team members, and the leadership in claimant's store, the investigatory team concluded that claimant's complaints of harassment, intimidation and a hostile work environment were "invalid." Transcript at 7. The investigatory team members told claimant that she would be allowed to remain on paid administrative leave through November 2, 2014 to enable her to seek medical assistance and, if she chose, to obtain a FMLA authorization to extend her time on leave. On that day, October 9, 2014, claimant told the investigatory team that she was going to quit work after her administrative leave ended, on November 3, 2014. On approximately October 24, 2014, claimant submitted a written notice of her resignation, effective on November 3, 2014.

(11) On November 3, 2014, claimant voluntarily left work.

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 P2d 722 (2010). The standard for showing good cause is modified for a claimant who has a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant who demonstrates that he or she has such an impairment, and 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 his employer for an additional period of time.

Because claimant testified generally that she experienced serious anxiety in the workplace, the first issue this case presents is whether claimant presented sufficient evidence to establish a permanent or long-

term physical or mental impairment which would require adjusting the usual standard for demonstrating good cause to leave work. Claimant testified that her anxiety did not first manifest itself until late July 2014, only three months before she quit work and roughly coincident with the first alleged acts of harassment by the store leadership, which does not appear to support the existence of a long-term impairment. Transcript at 19. That claimant's mental state might not have been as serious as she contended is also supported by her admission that she did not seek any medical assistance for her alleged impairment after it supposedly arose until she was aware that the employer was not likely to extend her administrative leave unless she was able to document a recognized impairment. Transcript at 9, 17, 18. Claimant's claim that she was experiencing physical manifestations of an anxiety disorder is also seriously undercut by the refusal of the physician's assistant to complete a FMLA health care provider authorization based solely on claimant's assertion that she was impaired and claimant's failure to follow through with having a mental health evaluation, as the physician's assistant recommended to her, to support her need for FMLA. While claimant contended that she did not do so because she thought she was physically unable to tolerate anti-anxiety medication based on her past experience with side effects from non-mood altering prescription medicines and she did not think that talk-therapy would benefit her, it appears that a person experiencing the level of discomfort that claimant contended she experienced would have most likely have been willing to try one or both treatment methods to possibly alleviate those symptoms. Transcript at 10, 12, 14. Based on the preponderance of the evidence in the record, claimant did not establish that she had a long-term mental or physical impairment that entitled her to take advantage of the modified standard for showing good cause in those circumstances.

Claimant also did not show that a reasonable and prudent employee without impairment, exercising ordinary common sense, would have experienced such a level of stress or anxiety under the circumstances she described that she would have reasonably been compelled to leave work. Transcript at 31. None of the specific incidents of alleged "harassment" by store leadership that claimant recounted appeared to have been unusually stress provoking, or described in such a way that they reasonably were more than relatively minor instructions to claimant to modify her workplace behavior. The episode in which the assistant store leader rebuked claimant for informing the regular customer that he was being surveilled in the store, was not disproportionate or abusive to claimant and a reasonable employee would have understood that the employer had an interest in determining itself, and not relying solely on claimant's judgment, that the customer was not fraudulently using credit cards. With respect to claimant's unequivocal and blunt comment that she did not feel compassion for the hospitalized team member, a reasonable and prudent employee would have understood that, regardless of her personal belief about why that particular team member was in the ICU, the assistant store leader rebuked her for that comment in order to maintain harmony and good morale among bakery team members and not to condone or encourage open attacks by one team member on another team member based on off-duty behaviors. A reasonable and prudent employee, exercising ordinary common sense, also would not have concluded that she was the target of harassment or experienced disproportionate stress or anxiety when the store leader commented unfavorably on the amount of time that her boyfriend was spending in the store. Although the store leader might have been incorrect in his estimate of the length of time that the boyfriend was in the store, a reasonable employee would understand that he was trying to ensure that all team members were focused on their work and not distracted by a personal visitor while on duty, and would not have concluded, without more, that the store leader was harassing her. Finally, that the store assistant leader chose to criticize claimant's view of her workplace contributions during claimant's performance evaluation, although it might not have been welcomed by claimant, was not an utterly unreasonable or abusive comment, especially in the context of a performance evaluation. A reasonable

and prudent employee, exercising ordinary common sense, would not have concluded that the only reason for such a mildly unfavorable comment was to harass claimant, would not have concluded that the comment was a grave reason to leave work and also would not have experienced such anxiety after the comment that she concluded that was unable to continue working for the employer.

As described by claimant, none of the incidents she cited, viewed alone or together, were reasonably explainable only as a part of a pattern of ongoing harassment directed at claimant. Nor would any of those incidents have reasonably engendered a level of stress or anxiety that would cause a reasonable and prudent person to conclude that she had to leave work to avoid those effects. On the facts as presented by claimant, a reasonable and prudent person would not have left work when she did.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-32653 is affirmed.

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

DATE of Service: March 17, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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