

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0205

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 12416). Claimant filed a timely request for hearing. On November 20, 2014, ALJ Clink conducted a hearing at which claimant did not appear, and on November 21, 2014 issued Hearing Decision 14-UI-29141, dismissing claimant's request for hearing. On November 25, 2014, claimant filed a timely request to reopen the hearing. On December 15, 2014, ALJ Kangas reviewed claimant's request to reopen, and issued Decision 14-UI-30375, denying claimant's request and leaving Hearing Decision 14-UI-29141 in effect. On December 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On December 30, 2014, EAB issued Hearing Board Decision 2015-EAB-1928, reversing Decision 14-UI-30375 and allowing claimant's request to reopen. On February 5, 2015, ALJ M. Davis conducted a hearing and on February 11, 2015 issued Hearing Decision 15-UI-33389, affirming administrative decision # 12406. On February 25, 2015, claimant filed an application for review of Hearing Decision 15-UI-33389 with EAB.

Claimant submitted a written argument that was comprised of an August 12, 2014 notice of a substantial evidence determination by the Oregon Bureau of Labor and Industries (BOLI) that the employer had subjected claimant to a hostile work environment based on race and reduced his hours in retaliation for opposing that unlawful employment practice, as well as two written statements that were apparently submitted to BOLI during its investigation. EAB customarily reaches decisions based on the record developed by the ALJ at a hearing independently conducted on the merits of claimant's claim for unemployment benefits and not based on determinations by other bodies on other matters, particularly when a hearing on those other matters was not conducted. Because the record in this case was fully developed on the relevant issues, and claimant did not explain how or why the determination from BOLI was necessary for a full consideration of his claim for benefits, EAB did not consider it, or the submitted statements, when reaching this decision. *See* OAR 471-041-0090(2) (October 26, 2006). EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) BZB Multi-State LLC, doing business as Wendy's, employed claimant as a crew member at one of its restaurants from January 15, 2014 until July 30, 2014.

(2) Sometime before July 2014, one of claimant's coworkers told claimant that another crew member had used the term "nigger" in the workplace. Transcript at 16. Although claimant did not hear the comment, he assumed it was directed at him because he was the only African American crew member. One of the restaurant managers discussed the team member's racially derogatory comment with claimant. Transcript at 38. In response to the comment that the team member had made, the employer's director of operations prepared a memorandum to all staff and crew members advising them that the use of racially derogatory references in the workplace was prohibited. Transcript at 25. All staff was required to sign an acknowledgement that they had read the memorandum. *Id.*

(3) In early July 2014, the general manager of the employer's restaurant left his employment and a new general manager was hired. One of the existing managers assumed the role of acting general manager and later trained the new general manager when he reported for his work assignment. From July 4, 2014 until July 10, 2014, the new general manager was not at work because he was relocating his family to the town where the employer's restaurant was located. During this time, the acting general manager continued to oversee the restaurant and its staff.

(4) On approximately July 5 or 6, 2014, the crew member who had earlier used the racially derogatory language asked a manager to arrange for "one of his niggers" to clean the floor of the restaurant. Transcript at 12. Claimant was at work when the coworker made the statement and heard it over the headset that he was wearing. Although the coworker's crew member's statement was not directed at claimant, claimant assumed he was its intended target. Shortly after he heard it, claimant reported to least some of the employer's managers the racially derogatory comment that the crew member had made. Around this same time, claimant filed a complaint with BOLI alleging that the employer had not taken appropriate corrective actions to stop the racially offensive actions of the team member in the workplace.

(5) Sometime between approximately July 7 and July 9, 2014, claimant told one of the employer's managers, who was also the acting general manager, that he did not want to work on the same shifts that the team member who had used the racially derogatory term worked. Because the work schedule for the week was already made up, the manager told claimant that he "had options," including helping her out by arranging for other crew members to cover the shifts when he was otherwise scheduled to work with the crew member who had used the offensive language. Transcript at 6. Claimant told the manager that if she did not change the schedule to eliminate any overlap between him and the team member, he would not be coming in to work that week as scheduled. Transcript at 6. Claimant did not report for his scheduled shifts during the remainder that week. Transcript at 10. On July 10, 2014, the new general manager was back at work.

(6) Sometime between when the team member made the offensive comment and approximately July 11 or 12, 2014, the employer's managers spoke to that team member and he stated that made the racially derogatory reference to claimant because claimant had called him a "cracker," which he considered a racial slur. Transcript at 25, 38. The employer's managers determined that they needed to investigate further before determining the appropriate action to take in view of claimant's and the coworker's conflicting claims. Transcript at 34, 35.

(7) During the work weeks after July 12, 2014, the acting general manager prepared work schedules under which claimant and the coworker worked separate shifts. The scheduled work time for both was reduced to avoid overlapping shifts. For one of those work weeks, claimant was scheduled for fourteen hours of work and the other team member for twenty-two hours. Transcript at 7. Claimant asked the acting general manager why his hours were cut, and she told him "because of the [racial] drama." Transcript at 7. Because there were more than fourteen work hours available when the other team member was not working during that week, claimant thought that racism was motivating the scheduling practices of the acting general manager. Transcript at 7-8. Sometime between approximately July 10, 2014 and July 25, 2014, the new general manager was away from work on a short vacation. Transcript at 33.

(8) Sometime after approximately July 25, 2014, claimant asked the new general manager the reason that one of his work weeks had been reduced to fourteen hours after he reported the racially offensive comments made by the other team member. The general manager told claimant that he was investigating the incident involving the offensive language and that he intended to speak with the other team member to "take care of the problem." Transcript at 34. The general manager asked claimant to "give [him] some time" and "[he'd] fix the problem." Transcript at 7, 34. The general manager also told claimant that the reduction in his hours had not been punishment, but to ensure that he did not work on the same days as the other team member. Transcript at 34. Sometime between July 25 and July 30, 2014, the new general manager met with the other team member. During this conversation, the team member who had used the racially offensive language quit work. Transcript at 19-20, 34.

(9) Claimant was scheduled to work on July 30, August 1, August 2, and August 3, 2014. On July 30, 2014, the shift supervisor told claimant that he had heard the former acting general manager stating that she had received the "grievance" that claimant had filed with BOLI and that she was going to "beat" that grievance and "cut" claimant's work hours. Transcript at 5, 8. Claimant then told the shift supervisor that he was quitting work because he was not "comfortable" in the workplace. Transcript at 13, 36, 40. Claimant did not ask the former acting general manager if she had made that statement, and did not bring that alleged statement up with the general manager. Transcript at 18, 20. Claimant did not thereafter return to the workplace or notify any of the employer's managers or the new general manager that he had quit.

(10) Claimant did not report for work for his scheduled shifts on August 1, 2 and 3, 2014, and did not call in to notify the employer of his absences. Sometime before between August 1 and 3, 2014, the acting general manager called claimant at his home and left a message asking him if he was going to report for work on the days he was scheduled. Claimant "didn't even bother with it [returning the call]." Transcript at 41.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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). 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 his employer for an additional period of time.

Although claimant testified extensively about the two alleged racial slurs of the one crew member, it does not appear that the employer condoned that crew member's behavior before that member quit, and the employer's new general manager was taking affirmative actions to sort out the problems that arose from it when claimant decided to leave work. Claimant did not challenge that, during the time the other crew member remained employed, the reason that the acting general manager reduced claimant's hours was due to claimant's desire to avoid working during shifts when the crew member who had allegedly used the racial slur was also scheduled to work, and that the manager also reduced the working hours of the other crew member. While it appears that one of claimant's contentions was that his hours were initially reduced as a form of employer retaliation for his complaints about the other team member's use of the racial slurs, he did not demonstrate that the employer's reduction of his hours was other than a temporary measure taken to keep claimant and the other crew member separated during the short period when the employer was investigating claimant's and the other crew member's conflicting allegations about who had used racial slurs against whom. The final clear reason that claimant contended that he decided to quit work was that, after his shift manager told him about the what the former acting general manager had said about "beating" the grievance he had filed with BOLI and further "cutting" his hours, he was no longer "comfortable" working with that manager and could not trust that manager or the employer. Transcript at 5, 8, 12, 13, 39-40.

While the comments that the shift manager reported to claimant from the former acting general manager were understandably of great concern to claimant, they obviously conflicted with the assurances claimant had received from the newly assigned general manager that he was going to "fix" the problem and the actions that the general manager had already taken to do so before claimant decided to quit. Transcript at 7, 13, 34. Claimant did not take steps to speak with the former acting general manager to determine that accuracy of what had been reported to him by the shift supervisor or attempt to speak with the former acting general manager to determine what she actually said, and, although the general manager had already spoken to claimant about this issue of the racial slurs, he did not contact the general manager, who was presumably superior to the former acting general manager, to determine if her alleged views and statements accurately reflected his own or the employer's positions. Transcript at 14, 18, 20, 28, 35. A reasonable and prudent employee, exercising ordinary common sense and who wanted to remain employed, who not have quit work before seeking some reasonable confirmation that the former acting general manager intended to retaliate against him for filing a BOLI complaint based on racially-based slurs in the workplace, particularly when the general manager, who was the workplace superior to the former acting general manager, had already acknowledged the problem and given claimant his assurance that he was going to resolve it.

On this record, claimant did not show good cause for leaving work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-33389 is affirmed.

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

DATE of Service: April 14, 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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