

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0513

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 25, 2015 the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 95004). Claimant filed a timely request for hearing. On March 31, 2015 and April 23, 2015, ALJ Vincent conducted a hearing, and on April 30, 2015 issued Hearing Decision 15-UI-37775, affirming the Department's decision. On May 5, 2015, 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) Northside Restaurant & Lounge employed claimant as a bartender in its bar from October 18, 2014 until January 2, 2015.

(2) The employer was licensed to serve alcoholic beverages on the restaurant premises and was subject to Oregon Liquor Control Commission (OLCC) regulations. Claimant had an OLCC server's permit and was subject to OLCC regulations.

(3) During claimant's two and a half months working for the employer, she generally worked Fridays, Saturdays and Sundays from 7:00 a.m. until 4:00 or 4:30 p.m. The employer served alcohol to its customers when it opened and afterward. The employer's cook, who was also its co-owner, generally did not arrive to prepare food until sometime around noon or 1:00 p.m. Until the cook arrived, claimant needed to prepare any food that was served to customers. The food that that was available for claimant to serve was salad, soup, cold-cut sandwiches, shrimp, and toast. The kitchen, where claimant needed to

prepare the food for service, was located in the back of the restaurant, in an area of the restaurant separate from the bar area. The bar area was not observable from the kitchen. Claimant never complained to the employer that she thought the food available for the customers before the cook arrived did not comply with OLCC requirements for premises authorized to serve alcohol. Claimant never informed the OLCC of her belief that the employer was not complying with OLCC requirements.

(4) During claimant's employment, she sometimes refused to continue serving alcohol to customers when she thought they were impaired. On occasion, the employer's co-owner and cook overruled claimant's decision to stop service to a particular customer. At such times, claimant refused to and did not serve further alcohol to the customer. The co-owner and cook served the customer. Claimant never complained to the second co-owner that she believed the first co-owner and cook was serving alcohol to impaired customers. Claimant never informed the OLCC of her belief that the employer was violating OLCC regulations that prohibited the service of alcohol to visibly impaired customers.

(5) Throughout claimant's employment, she encountered people loitering in the employer's parking lot when she arrived at work shortly before 7:00 a.m. On occasion, claimant saw what she believed were illegal transactions involving drug sales in the parking lot. Claimant did not tell either of the employer's co-owners that she was afraid of the people in the parking lot, or that she thought illegal drug transactions were occurring there. Claimant did not communicate her concerns to the OLCC.

(6) Sometimes during her employment, claimant saw customers in the restaurant bar who had guns or knives in their possession. Claimant did not know whether it was lawful or unlawful for those customers to possess the weapons that they did. Claimant did not tell either of the co-owners that she feared for her safety as a result of the customers' guns or knives.

(7) On December 28, 2014, claimant worked at the employer's restaurant and bar. On January 2, 2015, her next scheduled work shift, claimant did not report for work and did not notify the employer of her absence. On January 2, 2015, 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 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 contended at hearing that she stopped reporting for work on January 2, 2015 because the employer was engaging in behavior that violated OLCC regulations and jeopardized her OLCC server's permit. Transcript of March 31, 2015 Hearing (Transcript 1) at 10, 14. Claimant also contended that she quit work because she feared for her safety as a result of the presence of individuals loitering in the

employer's parking lot and the alleged possession of guns and knives by certain of the employer's customers. Transcript 1 at 16, 17; Transcript of April 23, 2015 Hearing (Transcript 2) at 5.

With respect to the employer's alleged violation of OLCC food service requirements, it is not at all clear that the employer was in violation. The foods that the employer had available for claimant's preparation when the cook was not present, in appropriate combinations, would appear to meet the OLCC requirement of at least five different meals, of which at least three must consist of a main course (or substantial food item) with at least two side dishes available to order separately. OAR 845-006-0459(1)(2)(3) (November 1, 2008); OAR 845-006-0460(2) (November 1, 2010). The shrimp, salad and sandwiches that the employer had available before the cook arrived would all constitute different main courses, with sandwiches having different cold-cuts each constituting a separate different main course. OAR 845-006-0459(3). Depending on the main course selected, a combination of the soup, salad and sandwiches that were available would also constitute the two required side dishes. While the employer contended at hearing that claimant was able to perform the food preparation to meet the OLCC requirements, claimant contended in her written argument that she could not because OLCC regulations prohibited her from leaving the bar unattended and she needed to enter the separate kitchen to prepare the food. Transcript at 13; Claimant's Written Argument at 2. EAB cannot locate any OLCC regulation prohibiting a bartender to leave the bar unattended for a brief period, or any period, to prepare food. *See* OAR 845-006-0301 *et seq.* Claimant did not meet her burden to demonstrate that the employer was violating OLCC regulations by the foods it made available when the cook was not present at times early in claimant's shifts.

With respect to claimant's contention about the co-owner cook serving alcohol to customers after she had decided that they were impaired, statutes and regulations state that it is a violation of OLCC requirements if a permit holder allows a "visibly intoxicated person" to consume alcohol. ORS 471.315(1)(a)(H); ORS 471.412(1); OAR 845-006-0020(4)(a) (September 1, 2014). However, a permit holder does not violate this prohibition if he or she made a good faith effort to stop the visibly intoxicated person from consuming further alcohol. ORS 471.412(2). From claimant's testimony, it is not apparent whether the overserved customers were "visibly intoxicated," or whether there was a legitimate, good faith difference of opinion between the co-owner and claimant about the customers' relative levels of sobriety and whether they being overserved. Assuming there was not, it appears to us that if claimant made a good faith effort to comply with OLCC regulations by stopping alcohol service to the customer, and did not personally serve the customer thereafter but the co-owner did (to which claimant objected), she did not violate OLCC regulations or put her server's permit in jeopardy. *See* OAR 845-009-0020(4)(a). Claimant did not demonstrate that the employer was requiring her take any actions that placed her server's permit in reasonable jeopardy.

While claimant contended that illegal drug transactions were ongoing in the employer's parking lot, and OLCC regulations do require a licensee to "take immediate and effective actions to prevent unlawful drug use or sales on a licensed premises" if the licensee or any employee personally witnessed the unlawful activity, claimant did not contend that she ever told either co-owner of these activities and the co-owner testifying at hearing stated that she was not aware of any such activity. OAR 845-006-0348(1) (October 1, 2007); Transcript 2 at 14. On these facts, it would appear that claimant had the affirmative duty to inform the employer, and it was the employer had no obligation to stop illegal drug activities of which it was not aware. Because claimant did not establish that she notified the employer of the alleged

illegal during activity in its parking lot, and did not show that the employer was otherwise aware of it, she did not show that the employer's failure to act to stop those activities violated OLCC regulations.

With respect claimant's to contentions about the guns and knives that some customers in the restaurant allegedly carried, aside from generally asserting that such possession caused her to fear for her safety, she did not present any specific evidence to show that such fears were reasonable, as for example, customers had a propensity to fight and aggressively brandish weapons or that, at any time, a weapon had been displayed in a threatening manner on the employer's premises. It does not appear reasonable for claimant to assume that customers posed a physical danger merely because they possessed weapons under circumstances where the possession might have been lawful, without showing that, for some objective reason, it was probable to infer that the weapons would be used for harmful purposes. Claimant also suggested in her testimony that she considered the presence of the individuals loitering in the employer's parking lot offensive, but did not present any evidence which showed that beyond disliking their presence, they presented some cognizable harm to her in addition to offending her personal sensibilities. Claimant did not establish that the customers' weapon possession or the presence of the individuals in the parking lot was an objectively grave reason to leave work.

Even if claimant subjectively believed that any of the various reasons that she recited for leaving work were significant, she admitted in her testimony that she did not take the obvious and logical step of notifying the employer's co-owners of her concerns and trying to correct them short of quitting work. Transcript 1 at 12, 15, 16; Transcript 2 at 7, 8. In response to direct questions about her failure to notify the co-owners of one or more of her concerns, claimant asserted that she could not do so because the co-owners were rarely present in the workplace. Transcript 1 at 12; Transcript 2 at 7. However when claimant was asked about the co-owners' presence in other contexts, she testified that the co-owner who was also the cook worked every day during the afternoon part of her shift, and she did not rebut the other co-owner's testimony that she worked with claimant on Fridays. Transcript at 1 at 10-11, 15, 16; Transcript 2 at 7, 8. Despite claimant's assertions, it appears likely that she had ample opportunity to raise any concerns with one or both of the co-owners because they were on the employer's premises at regular and predictable times during her work shifts. In addition, claimant did not present evidence suggesting that the circumstances were too much of an emergency to allow the employer an opportunity to take steps to attempt to resolve her concerns, or that she reasonably believed pursuing a resolution with the employer was futile. Viewing the record as a whole, a reasonable and prudent person who legitimately had claimant's stated concerns would not have concluded that she needed to leave work before notifying the employer of those concerns and determining that the employer would not take steps to resolve them.

Claimant did not show grave reasons motivated her to leave work, and did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-37775 is affirmed.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating

DATE of Service: June 23, 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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