

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0748

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 13, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 91830). Claimant filed a timely request for hearing. On June 5, 2015, ALJ Shoemake conducted a hearing, and on June 12, 2015 issued Hearing Decision 15-UI-39977, affirming the Department's decision. On June 19, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that was comprised of an affidavit that attempted to introduce new facts into evidence that were not presented during the hearing. Claimant did not explain why she was not able to present this new information at the hearing or otherwise show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new facts that claimant sought to introduce in her affidavit. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Nonna Emilia employed claimant as a hostess from September 12, 2014 until April 3, 2015. The employer operated a restaurant.

(2) The son of the employer's owner was one of the managers in the restaurant. The son's name was Justin. Another employee, Linda, worked as another of the employer's managers while also working as a server. Both Justin and Linda were claimant's supervisors. The owner was rarely in the restaurant and he left the day-to-day operations to the managers. The employer did not have a human resources department or a human resources representative.

(3) Claimant often worked from 3:00 p.m. until 10:00 p.m. Throughout her employment, the employer did not allow claimant to take rest or meal breaks during her shifts. Claimant spoke to Linda about this on several occasions, told Linda that she was required to eat her lunch at her work station while she remained on duty, and told Linda that the employer was required by law to provide breaks to her and other employees. Transcript at 17, 18. When claimant raised this issue, Linda usually either did not respond or apologized to claimant and said that there was no employee to cover for her if she was allowed to take a break. Transcript at 18, 19. Once, Linda told claimant that she could leave her station to “eat really fast in the kitchen.” Transcript at 18. When claimant later went to the kitchen to eat her lunch, the owner was viewing workplace activities on the surveillance system and immediately told claimant that she was not allowed to leave her work station to eat and to return to her station. Transcript at 18. If claimant tried to discuss any workplace concerns she had with the owner when he was in the restaurant, the owner “yelled at [her] for not being at [her] work station” when speaking with him or he would tell claimant she needed to speak with Linda or Justin and not with him. Transcript at 20.

(4) On December 31, 2014, claimant gave to Justin a note from her physician stating that claimant, who was pregnant, was restricted from lifting weights in excess of twenty pounds in the workplace and also needed to be allowed to take meal breaks. Transcript at 21, 40. Claimant was still not allowed to take meal or rest breaks at work. After claimant delivered the physician’s note restricting her from lifting weights, Justin often would instruct her to assist in bussing restaurant tables, which involved tasks that sometimes required claimant to lift weights exceeding twenty pounds.

(5) On January 22, 2015, claimant was performing closing duties when Justin was on-duty as the manager. Justin began rubbing and pressing against claimant’s back and told her that she was more attractive since she had become pregnant. Claimant left the workplace to go to her car and Justin followed her. Justin kissed claimant and placed his hands in her pants and tried to touch her in the area of her vagina. Claimant told Justin to stop and left in her car.

(6) After January 22, 2015, claimant told some coworkers about the interaction with Justin. At the end of January 2015, claimant brought up what had happened with Linda, but did not provide a detailed description of it because Linda had gossiped unflatteringly about another employee who had made a sexual harassment complaint against a coworker. Linda told claimant at she was aware that Justin “did something to you,” and stated that Justin was “going to be in the kitchen now” and no longer working as a manager on the restaurant floor. Transcript at 13. The kitchen was very near claimant’s work station. After Justin was moved to the kitchen, he would “snap and yell” at claimant if no manager was on duty or if Linda was busy. Transcript at 16. If claimant tried to get instructions from Linda about particular workplace matters, Justin would tell claimant that she needed to consult with him. Although Justin was moved to the kitchen, claimant was unable to avoid contact with him.

(7) Claimant continued to work for the employer despite her concerns over the lack of breaks and the continuing contact with Justin because she was pregnant and thought that if she left no other employer would hire her until her child was born. Claimant needed the income she earned from working for the employer.

(8) On April 3, 2014, the owner spoke with claimant about a complaint that a customer had made about her service. When the owner brought up the complaint, claimant “all of a sudden” started crying.

Transcript at 28. The encounter with the owner brought to the surface claimant's dissatisfactions with the employer. Claimant told the owner that she had a doctor's note restricting her work activities because she was pregnant and stating that she was allowed to take meal breaks and that it had not been followed. Transcript at 8, 28, 40. Claimant told the owner that she had heard about Justin's behavior before she started working for the employer and that she had been sexually harassed during her employment, but had "kept her mouth shut." Transcript at 29. The owner did not understand what claimant meant by her statements and did not ask her. The owner told claimant she should bring up any complaints about alleged sexual harassment with Linda. Transcript at 29. When the owner tried to calm claimant, she stated, "I'm not upset. I'm angry." Transcript at 28. Claimant told the owner she was "sick to [her] stomach" and abruptly left the workplace because she perceived that the owner "did not seem to care" about her complaints. Transcript at 22, 29. Claimant did not return thereafter to the workplace.

(9) On April 3, 2015, claimant voluntarily left work.

CONCLUSIONS AND REASONS: 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 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.

In Hearing Decision 15-UI-39977, the ALJ concluded that claimant left work without good cause. The ALJ reasoned that claimant left work in reaction to the customer's complaint and not because of concerns over Justin's treatment of her or the employer's failure to provide work breaks, and that a customer complaint was not a grave reason to leave work. Hearing Decision 15-UI-39977 at 2. Alternatively, the ALJ reasoned that "[t]o any extent that claimant left work due to her concerns about the owner's son, lack of breaks or performing work outside of her medical restrictions, claimant failed to pursue the reasonable alternatives of taking her concerns to the dining room manager or the owner for resolution." Hearing Decision 15-UI-39977 at 2-3. We disagree.

The ALJ erred in concluding that claimant did not leave work as a result of a combination of Justin's ongoing behavior, the employer's ongoing failure to provide work breaks and its failure to abide by the physician-authorized work restrictions. Almost no mention was made during the hearing of the customer complaint, and the near-exclusive focus of both parties' testimony was on Justin's behavior, the employer's ongoing behavior in not providing work breaks and the physician's restrictions. Transcript at 7, 27-28. Neither party contended that claimant's highly emotional behavior during the meeting with the owner on April 3, 2015 was in any way related to the customer complaint. Claimant explained that her intense reaction during the meeting and her decision to leave work was due to her ongoing dissatisfaction with the employer's continuing failure to respond to her concerns about workplace conditions, including Justin's behavior, the lack of breaks and assigned work duties

exceeding her medical restrictions. Transcript at 5, 6, 8, 22, 23. Both of the employer's witnesses appeared to accept claimant's explanation about why she decided to leave work on April 3, 2015, although both appeared perplexed about the cause of claimant's upset during the owner's meeting with her. Transcript at 28. There was insufficient evidence in the record to support a conclusion that claimant left work in reaction to the customer's complaint or the manner in which the owner addressed the complaint at the meeting. It appears, most likely, that claimant decided to leave work due to the manner in which the employer had addressed Justin's past behavior, the failure to provide breaks and the failure to abide by the work restrictions.

Claimant contended at hearing that she was never allowed to take the rest breaks or work breaks that the employer was required to provide to her as a matter of state law. Assuming claimant worked a seven hour shift, as she contended and which the employer's witnesses did not rebut, the employer was required to provide to her at least two ten minute rest breaks and one thirty minute meal break during her shift unless the employer was exempt from those requirements. *See* ORS 653.261(1); OAR 839-020-0050(2) (meal breaks) (January 1, 2014); OAR 839-020-0050(6) (rest breaks). The employer's owner testified that the employer did not have an exemption from the requirement to provide breaks, and the employer did not show at hearing that it fell within any other of the potentially applicable exemptions. Transcript at 31; OAR 839-020-0050(3); OAR 839-020-0050(4); OAR 839-020-0050(6)(b). Although the employer's witnesses testified that the employer did provide to claimant the breaks that the law required, it was apparent from their testimony that they did not understand what constituted a break period within the meaning of the state requirements. When a thirty minute meal or a ten break period is required, it means that during that period, the employee must be "relieved of all [job] duties. OAR 839-020-0050(2)(a); OAR 839-020-0050(6)(a). The employer's owner asserted that the employer met its legal obligations to provide breaks because the employees were allowed to consume soft drinks, water or food at their work station when "it was hard to get away," and one of the employer's managers testified that "I try to give my girls a break." Transcript at 30-31, 41. An employee who is allowed to consume drink or food at a work station does not appear to have been "relieved of all duties," as the applicable regulation requires. An attempt by a manager to allow employees to take breaks does not satisfy the mandatory requirement of making breaks available, and there is no good faith or best efforts exception to that mandatory duty. On this record, there was insufficient evidence to rebut claimant's testimony that the employer did not give her the lawfully required breaks.

Claimant took reasonable steps to secure the employer's compliance with Oregon law about required work breaks when she communicated her concerns on several occasions to one of her managers, Linda, but no corrective action was taken. The employer's witnesses did not directly rebut that she did so, and from the owner's testimony about the manner in which he referred claimant to Linda when she raised issues about alleged sexual harassment, it appears that Linda was the appropriate manager with whom to take her complaint about the lack of breaks. Transcript at 29. Moreover, based on the testimony of claimant and the owner, he was rarely available in the workplace to address complaints about working conditions, he generally referred claimant to Linda or Justin, and, based on claimant's testimony, the owner often responded angrily when she tried to raise such concerns with him when he was in the workplace. Transcript at 18, 20, 38. On the facts in this record, it was not unreasonable for claimant not to raise her complaints about breaks with the owner given his responses to them in the past, or with Justin given his behavior toward her. While the ALJ asserted that claimant had the "reasonable alternatives of taking her concerns to [Linda] or the owner for resolution," the record does not support that under the circumstances either alternative was, in fact, a reasonable alternative that claimant had not

yet exhausted when she decided to quit work. Hearing Decision 15-UI-39977 at 3. Nothing in the record suggests that raising her concerns an additional time with Linda, Justin or the owner would yield a different result for claimant.

EAB has consistently held that no reasonable and prudent person would continue working indefinitely for an employer who engaged in unlawful employment practices on an ongoing basis. *See Chelvey L. Francis* (Employment Appeals Board, 2014-EAB-1191, August 13, 2014) (good cause to leave work when claimant took reasonable, unsuccessful efforts to secure employer's compliance with laws requiring payment of wages); *Brandon L. Lopez* (Employment Appeals Board, 2014-EAB-0614, May 14, 2014) (good cause to leave work when employer failed on an ongoing basis to pay claimant in accordance with state law after claimant had waited a reasonable time after he complained); *Kaitlynn A. Amis* (Employment Appeals Board, 13-AB-0949, July 7, 2013) (good cause to leave work when, despite repeated complaints, employer did not provide the rest and meal breaks required by state law); *Orville E. Baumgardner* (Employment Appeals Board, 12-AB-2132, August 30, 2012) (good cause to leave work when employer did not pay claimant in accordance with state law); *Tom D. Opp* (Employment Appeals Board, 12-AB-0380, February 8, 2012) (good cause to leave work when employer did not pay state required minimum wage on an ongoing basis). Here, the employer did not provide claimant the work breaks to which she was entitled under state law on an ongoing basis and throughout all of the time that she was employed. Despite claimant reasonable efforts to persuade the employer to comply with the law, claimant was unable to achieve that compliance. It was not reasonable to expect claimant to continue to work indefinitely under conditions that violated Oregon law on an ongoing bases, and those working conditions constituted good cause for claimant to leave work when she did.

Because we have concluded that the failure of the employer to provide rest and meal breaks to claimant was good cause for claimant to leave work, we need not and do not address the other reasons claimant quit work, specifically, Justin's behavior and the employer's failure to abide by claimant's physician authorized work restrictions.

Claimant voluntarily left work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-39977 is set aside, as outlined above.

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

DATE of Service: August 10, 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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