

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0980

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 18, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #71644). Claimant filed a timely request for hearing. On July 23, 2015, ALJ R. Davis conducted a hearing, and on July 31, 2015 issued Hearing Decision 15-UI-42430, affirming the Department's decision. On August 17, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that presented many new facts not presented during the hearing. Claimant did not explain why she did not offer these facts during the hearing or otherwise show that she was prevented from doing so by factors or circumstances beyond her reasonable control as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB did not consider the new facts that claimant attempted to offer in her written argument. EAB considered only evidence in the hearing record when reaching this decision.

FINDINGS OF FACT: (1) City of Eugene employed claimant as a recreation office coordinator from May 9, 2005 until April 1, 2015.

(2) Claimant was a member of the Jehovah's Witnesses religion. The employer expected claimant to refrain from communicating her religious beliefs in the workplace unless the communication was solicited by others in the workplace. Claimant understood this expectation.

(3) On May 15, 2014, claimant placed a condolence card on the desk of a coworker whose father had recently died. The card contained Bible verses and other religious content. Transcript at 28; Exhibit 1 at 12. In the card, claimant had handwritten, "I am very sorry for your loss. I've learned of a hope [for you] to be able to see your loved one again. If you'd like more information please let me know. I'd be happy to help you." Transcript at 7.

(4) On May 19, 2014, claimant's supervisor told claimant that the condolence card had "bothered" and "offended" the coworker. Transcript at 8. The supervisor further stated that claimant should "never be

doing that.” Transcript at 9. Claimant did not understand why her card might have been offensive to the coworker. Claimant thought that her supervisor was favoring the coworker over her because he “didn’t even ask [for] my side.” Transcript at 10.

(5) Also on May 19, 2014, the coworker to whom claimant had given the condolence card told claimant that she was prohibited from entering her work area. Since the coworker kept some business supplies at her desk that claimant occasionally needed to use, the coworker’s exclusion of claimant from her work area was inconvenient. Claimant immediately told her supervisor what the coworker had said and stated that the coworker was “discriminating” against her. Transcript at 11. When the supervisor did not take action to forbid the coworker’s exclusion of claimant, claimant complained to the coworker’s supervisor about the coworker’s prohibition against entering her work area. The coworker’s supervisor listened to claimant, expressed her concern over the coworker’s behavior and said she “would look into it.” Transcript at 16. However, claimant thought the coworker’s supervisor did nothing in response to her complaint because the coworker did not stop banning claimant from her work area. Transcript at 13. Claimant then contacted her union representative about the coworker’s alleged discrimination. Transcript at 13. Claimant concluded that her supervisor and the coworker’s supervisor were treating her unfairly and allowing the coworker to “bully” her. Transcript at 16. Claimant did not directly contact the employer’s human resources department about her belief that the employer was discriminating against her and treating her unfairly by permitting the coworker’s behavior.

(6) Sometime in 2014, claimant’s supervisor mentioned to her that she was spending too much time in the restroom during her work hours. The supervisor told claimant that she should not visit the restroom other than during her scheduled breaks or she would need to deduct her time in the restroom from the time set aside for her rest or meal breaks. When claimant objected that other employees were not subject to similar instructions, the supervisor told her that she was “singled out” because she was “different.” Transcript at 24. Claimant thought that the supervisor’s comments to her about restroom activities “went against [her] dignity.” Transcript at 22. Claimant thought that the supervisor was treating her unfairly and was discriminating against her by attempting to regulate her trips to the restroom. Claimant contacted her union representative about the employer’s treatment of her in connection with her visits to the restroom. Claimant did not complain to the employer’s human resources department.

(7) In November 2014, claimant’s supervisor told her that he was reducing her scheduled work hours from 30 per week to 20 per week due to “budget cuts.” Transcript at 17. After claimant’s work hours were reduced, claimant attended a city-wide meeting in which employer representatives stated that “the budget was doing great.” Transcript at 17. Around this same time, claimant observed that none of her coworkers’ hours were similarly reduced. Claimant concluded that the supervisor was discriminating against her by reducing her hours. Claimant contacted her union representative about her reduced hours but did not contact the employer’s human resources department.

(8) In January 2015, claimant and her supervisor were preparing claimant’s annual performance evaluation. In a section completed by the supervisor, he noted that claimant needed to improve her performance by “be[ing] at [her] work station and ready to work at the start of [her] work shift.” Exhibit 1 at 9. Thereafter, the supervisor had “several” conversations with claimant about arriving at work 15 minutes before the scheduled start of her shift. Transcript at 25. Claimant concluded that, because the supervisor did not intend to pay her for her early arrival, he was going to violate employee compensation

laws. Claimant thought that the supervisor was again mistreating her. As well, because the supervisor did not turn in claimant's evaluation on time, claimant thought that he was further discriminating against her.

(9) On March 12, 2015, claimant completed an employment discrimination questionnaire for the Oregon Bureau of Labor and Industries (BOLI). In the questionnaire, claimant stated that she objected to the employer's unlawful discrimination based on her religious beliefs. Exhibit 1 at 11-14. Claimant described the incident with the condolence card in 2014, the employer's failure to take action against that coworker, and the supervisor's reduction of her work hours as examples of the employer's discrimination. Claimant filed the questionnaire with BOLI rather than ever raising her concerns about discrimination directly with her supervisor's supervisor or the employer's human resources department because she assumed that her union representative had already made these contacts on her behalf. Transcript at 11, 15, 26.

(10) On March 18, 2015, claimant sent an email to her supervisor's supervisor, the recreation services division manager, stating that she was resigning effective April 1, 2015. Exhibit 1 at 17-19. In her resignation letter, claimant stated that her resignation was due to various forms of "harassment and discrimination" by her supervisor and his retaliatory behavior. *Id.* at 18. Claimant specifically contended that she was subjected to religious discrimination arising from the condolence card incident, the failure of the supervisors to investigate that incident or to stop her coworker's subsequent behavior and "bullying and mistreatment" by her supervisor through his restrictions on her trips to the restroom. *Id.* at 18, 19.

(11) On March 20, 2015, the recreation services division manager replied to claimant's emailed resignation letter and stated that he had not previously known of the issues raised in the letter and he had commenced an investigation of them by the employer's human resources department. Exhibit 1 at 16-17. Claimant's resignation letter was the first notice that the recreation services division manager or the human resources department had of claimant's complaints about discrimination, harassment and retaliatory conduct.

(12) On April 1, 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.

While claimant stated several times during the hearing that her supervisor and her coworker "mistreated" and "discriminated" against her after she gave the coworker the condolence card in May

2014, she did not specify the form of that discrimination or if she thought it was based on her religious beliefs. Transcript at 10, 11, 15, 24. Assuming claimant's contention was one of religious discrimination, the employer most likely did not infringe on her rights to religious expression when her supervisor told her that her coworker was offended by the condolence card and she should not express her religious views in the workplace unless it was solicited by the person with whom she was communicating. EEOC Compliance Manual Number 915.003 (7/22/2008), Religious Discrimination, §12-IV-C-6. In addition to reasonably accommodating claimant's religious expression, the employer also had a duty to protect the coworker from unwelcome religious communications in the workplace. On this record, it does not appear that the actions of claimant's supervisor, taken in response to the coworker's objections, were discriminatory or constituted a grave reason for claimant to leave work. Nor does it appear that claimant's supervisor did or said anything in his interaction with claimant on May 19, 2014, that reasonably could have been perceived as offensive, hostile, abusive or disrespectful. As to the actions of the coworker in banning claimant from her work area, no reason for them can be discerned in the record. The preponderance of the evidence fails to show the coworker's actions were based on claimant's religious views. When claimant's supervisor and the coworker's supervisor failed to take actions against the coworker in response to her exclusion of claimant from her work area, claimant did not show that they did so out of a discriminatory animus. Claimant did not rule out that the supervisors took no action because they did not want to antagonize the coworker, who may have been annoyed at claimant for some non-discriminatory reason, or to cause a further disruption in the workplace by appearing to take sides in a conflict of personalities. In any event, the record fails to show the inconvenience that claimant experienced from the coworker's behavior was grave or caused her any significant hardship. The only hindrance claimant experienced from the coworker's exclusion was that she had to wait until the coworker left her desk to have access the some office supplies. Transcript at 13. Claimant did not explain why she could not have gathered and stored those same supplies at her own desk. Claimant did not meet her burden to demonstrate that the incident involving the condolence card, the coworker's behavior after the incident, or the supervisors' failure to take action in response to the coworker's behavior were objectively grave reasons for leaving work.

Claimant also did not demonstrate that the other behavior of her supervisor that she contended was unfair or mistreatment created objectively grave circumstances for her. As claimant described the supervisor's instructions to her about restroom breaks, as we can best discern, he had some concerns about the length of time claimant was spending away from her desk in the restroom. Since claimant did not contend that other employees took such frequent trips to the restroom for the amount of time that she did, she did not rule out that there was a neutral, work-related explanation for why the supervisor singled claimant out for instructions. Claimant did not contend that she had a medical condition that necessitated frequent use of the restroom or that restricting her time in the restroom to her rest breaks was somehow injurious to her health or caused any cognizable harm to her. On this record, it also does not appear that the supervisor's instructions about restroom breaks were a sufficiently grave reason for claimant to leave work.

As well, there is little evidence other than claimant's speculation to support her claim that the supervisor reduced her work hours in November 2014 for discriminatory or retaliatory reasons. While the employer's representatives might have reassured the audience at a city-wide meeting that the overall budget was in good shape, this does not necessarily lead to the conclusion that claimant's supervisor did not need to reduce the labor hours in claimant's department for budgetary reasons. While other employees might not have had their hours reduced, claimant did not show that those employees were

similarly situated to her, and did not rule out that the supervisor had neutral business reasons for reducing her hours. That the supervisor allegedly told claimant he wanted her to arrive for work 15 minutes before the start of her shift, after it was noted in her performance evaluation that she needed to improve her punctuality, does not rule out that his instruction was a precatory one, expressing his wish that she ensure a timely arrival at work and not a requirement that she work 15 minutes without compensation. Furthermore, nowhere in the record does claimant state that she actually started reporting to work 15 minutes early or that the supervisor threatened to discipline her because she did not. Absent some evidence demonstrating that the supervisor compelled claimant to work uncompensated hours, or was going to punish her if she did not, claimant did not show that the supervisor's comments about arriving 15 minutes early created a grave circumstance for her. Finally, claimant did not identify any harm, and we can discern none, from her supervisor's failure to submit her January 15, 2015 performance evaluation as promptly as claimant would have liked. As with her other reasons, claimant did not demonstrate that this was a sufficiently grave reason to leave work.

Moreover, even if claimant thought that any of these above reasons were grave, she did not take the steps of a reasonable and prudent person to determine if there were alternatives available to her short of leaving work. It appears from the record that, while claimant raised her various concerns and complaints with her union representative, the representative did not forward those concerns to the employer, including to the recreation services division manager or the human resources department. Claimant agreed that she did not herself raise her concerns with those employer representatives, although she was aware of their role in resolving workplace issues. Transcript at 15, 16. From the prompt response of the recreation services division manager in forwarding claimant's resignation letter to the human resources department and his initiation of an investigation into claimant's allegations of discrimination, mistreatment and workplace hostility, the record shows the employer took the complaints seriously when it became aware of them. A reasonable and prudent person in claimant's situation would not have concluded that she needed to leave work because her immediate supervisor allegedly had not taken action to resolve her complaints until she first ensured that her union representative brought those concerns to the attention of the supervisor's supervisor, the recreation services division manager, or the human resources department, or until she had personally raised them with those employer representatives. Because claimant did not show that raising her concerns with those employer representatives was likely futile, and the representatives' behavior after they were notified of the allegations in her resignation letter demonstrated that it was not, claimant left work before she was able to reasonably conclude that she had no alternative other than to leave work. Because claimant did not take the steps of a reasonable person to determine if there were alternatives other than to leave work, claimant also did not show that she had good cause for leaving work.

Claimant did not show good cause for leaving work when she did, both because her reasons for doing so were not grave and because she did not show that there were no alternatives but for her to leave work. For these reasons, claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-42430 is affirmed.

Susan Rossiter and J. S. Cromwell, participating.

DATE of Service: September 22, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.