

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1134

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 11, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 124227). Claimant filed a timely request for hearing. On September 8, 2015, ALJ Murdock conducted a hearing, and on September 9, 2015 issued Hearing Decision 15-UI-44110, affirming the Department's decision. On September 28, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that he provided a copy of his arguments to the other party as required by OAR 471-041-0080(2)(a) (October 29, 2006). The arguments also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Interfor US Inc. employed claimant from November 28, 2011 to July 17, 2015.

(2) In early 2015, claimant's supervisor began subjecting claimant to unwanted sexual touching and comments. Over a period of approximately seven months, the supervisor repeatedly grabbed claimant's buttocks and genitals, told claimant, "I want to fuck you in the ass," and said he wanted claimant to come to the office so claimant could "suck my dick." Audio recording at ~ 9:50 to 10:20. On another occasion, the supervisor asked claimant and another employee into his office as though for a meeting and, once they arrived, he asked which of them would "fuck me in the ass." *Id.* On that occasion, the supervisor did not hold a meeting or say anything else to claimant and the coworker, and had asked them into the office for the sole purpose of making that comment to them.

(3) Claimant told the supervisor to stop, but the supervisor did not make any lasting or permanent changes in his behavior. The supervisor targeted other employees for the same treatment. The

employer's superintendent and other supervisors witnessed the way the supervisor treated claimant and others, but they did not do anything to stop the supervisor. Claimant complained to another manager a couple of times but the manager did not do anything as a result.

(4) Shortly before July 13, 2015, the supervisor walked up behind claimant while he was standing on an elevated catwalk and suddenly grabbed claimant's genitals. Claimant almost fell off the catwalk. On July 13, 2015, claimant reported the supervisor to human resources. Human resources suspended the supervisor, but did not keep claimant's complaint confidential and all of claimant's coworkers and supervisors knew claimant had complained. Thereafter, claimant observed that the employer's superintendent, other supervisors, human resources staff and the supervisor's friends began to treat claimant differently and stopped talking to him. On July 14, 2015, the superintendent issued a warning to claimant for being absent due to his daughter's illness. On July 17, 2015, the superintendent issued another warning to claimant alleging that he had been tardy for a shift even though he had reported to work early on the day in question.

(5) Claimant felt unsafe at work because of the way his supervisor treated him. Claimant believed he was the target of retaliation because of the way the superintendent, other supervisors and human resources treated him after information about his complaint was disclosed. On July 17, 2015, claimant quit work. Prior to quitting, he had not complained about retaliation to human resources.

CONCLUSIONS AND REASONS: We disagree with the ALJ, and conclude claimant quit work with 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.

In Hearing Decision 15-UI-44110, the ALJ concluded claimant quit work without good cause. The ALJ reasoned that claimant left work too soon, without having allowed human resources time to complete the investigation into his July 13th complaint or reporting the alleged retaliation, both of which the ALJ concluded were reasonable alternatives to quitting work. Hearing Decision 15-UI-44110 at 3. We disagree.

At the time claimant quit work, he had been subjected to offensive unwanted sexual contact by a supervisor for approximately seven months, and the supervisors and superintendent had observed and were aware of the contact without taking any steps to stop the offensive conduct. Claimant's working conditions were abusive and oppressive, and no reasonable and prudent person would have continued to work for the employer for an additional period of time. See *accord McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979).

Once claimant reported his supervisor to human resources, the employer's management staff, including from human resources, stopped talking to claimant and he was almost immediately subjected to unprecedented disciplinary action. Based on those events, and because many of the employer's managerial staff were aware of the abuse claimant was subjected to at work and took no action to stop it, claimant reasonably concluded that he was being retaliated against because of his complaint. No reasonable and prudent person would consider that waiting an additional period of time for the employer to address claimant's harassment complaint, or making an additional complaint to human resources about the retaliatory activities, were reasonable alternatives to quitting work under the circumstances.

Claimant voluntarily left work with good cause, and he is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Hearing Decision 15-UI-44110 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 16, 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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