

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1477

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 95907). Claimant filed a timely request for hearing. On November 30, 2015, ALJ Vincent conducted a hearing in which the employer did not participate, and on December 7, 2015, issued Hearing Decision 15-UI-48742, affirming the administrative decision. On December 7, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Cedar Crest Alzheimer's Special Care facility employed claimant as food director from March 24, 2015 until October 13, 2015.

(2) On July 9, 2014, the employer's administrator met with claimant and told claimant that certain individuals, whom the administrator would not name, had accused claimant of stealing items from the kitchen. Other than the reports from the unnamed individuals, the administrator had no proof that claimant had stolen anything. The administrator did not discipline claimant for the alleged theft.

(3) On April 17, 2015, claimant sent the regional manager an email regarding inappropriate behavior of some of her coworkers. The regional manager never responded to claimant's email.

(4) From February through June 2015, claimant was on protected leave under the Family Medical Leave Act (FMLA). The administrator offered to give claimant some paid time off during her leave. When claimant received her first paycheck while on leave, she noticed that she had not received the paid time off the administrator had promised to give her. Claimant called the regional director to tell her there had been an error in her paycheck. The regional director became very angry at claimant, and accused her of being greedy. Audio Recording at 28:45.

(5) On June 3, 2015, while on leave, claimant was directed to return to work to prepare a schedule. Claimant was not paid for the time she spent preparing the schedule. Claimant noted on the schedule that she would be returning to work on June 12, 2015. An employee whom claimant

supervised noticed claimant's return to work, became angry and began yelling at claimant; the coworker wanted to be assigned the shifts that claimant would begin working on June 12. Claimant asked the employee to leave the work area. The employee left, sought out one of the employer's managers, and falsely told the manager that claimant had discharged him. The administrator suspended claimant for supposedly discharging the employee.

(6) On June 8, 2015, the administrator gave claimant a final written warning for supposedly changing the posted schedule on June 3. When the administrator presented claimant with the warning, she told her that she knew claimant had not changed the schedule, but said she had to discipline her. Audio Recording at 35:05.

(7) On July 7, 2015, a new administrator began working at the facility where claimant was employed. On July 8, 2015, the administrator told claimant he was placing claimant on a performance improvement plan. Claimant objected to the plan, telling the administrator that he knew nothing about her work because he had been on the job for only a day. The administrator responded that even though he did not know how claimant worked, he was still going to "write her up." Audio Recording at 36:15.

(8) On August 7, 2015, claimant asked the administrator if she could leave work early to purchase items for the kitchen, and the administrator granted claimant permission to do so. On August 14, 2015, the administrator gave claimant a final written warning for leaving work on August 7 without permission. Although the administrator confirmed that claimant had asked and received permission to leave work on August 7, he still disciplined her.

(9) Sometime prior to October 7, 2015, one of claimant's coworkers offered to give claimant some over the counter Tylenol that the coworker was unable to use. Claimant agreed to accept the Tylenol, and the coworker brought the medication to work and gave it to claimant. Claimant was unaware of any employer policy that prohibited her from accepting over the counter medication from a coworker while on the job.

(10) On October 7, 2015, the administrator suspended claimant for an indefinite period for alleging violating the employer's policy by exchanging medication in the workplace. While she was suspended, claimant's roommate, who worked with claimant, told claimant that the administrator was talking with other employees in the facility about what claimant had allegedly done, and was harshly criticizing claimant's actions and job performance to other employees. As a manager, claimant understood that the employer's policy and procedures required that only human resources personnel investigate employee misconduct; the administrator had no authority or responsibility to perform these types of investigations.

(11) Between October 7 and 13, 2015, claimant contacted the employer's human resources director numerous times to complain about the administrator's behavior. The human resources director did not respond to claimant.

(12) On October 9, 2015, claimant contacted the regional director to complain about her suspension. Although the director said she would look into the situation and respond to claimant within a few days, claimant heard nothing further from the director.

(13) On October 13, 2015, the assistant to the human resources director called claimant and asked if she still needed to talk to the human resources director. When claimant said that she wanted to speak with the human resources director about an urgent matter, the assistant responded that the human resources would promptly get back to claimant. The human resources director did not contact claimant, however.

(14) Also on October 13, 2015, claimant quit her job because the employer treated her unfairly.

(15) During the last few months of claimant's work for the employer, she was pursuing a worker's compensation claim and medically restricted from performing certain work. The employer regularly required claimant to perform work she was restricted from performing, such as lifting objects that weighed more than 10 pounds and working 12 hour shifts. Audio Recording at 29:48.

CONCLUSION AND REASONS: We disagree with the ALJ. We conclude that 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.

Claimant quit her job because of ongoing unfair treatment by the employer. The record shows that on July 8, 2015, a newly hired supervisor placed claimant on a performance improvement plan, when he admitted that he knew nothing about claimant's work. In addition, on June 8, and August 14, 2015, claimant's supervisors imposed severe discipline – suspensions and final written warnings – on claimant for behavior that the supervisors admitted claimant had not engaged in. On October 7, 2015, claimant's supervisor again suspended her for allegedly violating a policy of which claimant was unaware. Rather than following the employer's procedure by referring the matter to human resources personnel for investigation, the supervisor told other employees what claimant had supposedly done, and spoke harshly and critically about claimant's behavior. During the last few months she worked for the employer, claimant was required to perform work she was medically restricted from performing. A manager's behavior toward an employee may be good cause to leave work if a claimant shows she was subjected to ongoing "oppression" or "abuse" in the workplace. *See, e.g., McPherson v. Employment Division*, 285 OR 541, 557, 591 P2d 1381 (1979) (claimants are not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits.") The unfair and harsh discipline claimant experienced on the job, the arbitrary imposition of a performance improvement plan, and the requirement that she perform work she should not have been performing, created an oppressive work environment for claimant and constituted a grave situation.

The ALJ, however, concluded that claimant "had reasonable alternatives to quitting work when she did. For instance, the claimant had the reasonable alternative of continuing to bring her fears to the attention

of the human resource department and attempting to redress them.” Hearing Decision 15-UI-48742 at 5. We disagree. During her work for the employer, claimant repeatedly contacted the employer’s human resources director and regional director to attempt to resolve workplace problems she was experiencing. These managers never responded to claimant. As a result, claimant had no reason to believe that the human resources director would ever provide her with any support or assistance when she was complained to them about her October 7 suspension. A claimant is not required to pursue alternatives to quitting a job that are futile. *See, e.g., Early v. Employment Department*, 274 Or App 321, 328 (2015) (claimant was not obligated to request additional conflict resolution services before voluntarily leaving work when past use of conflict resolution services did not improve claimant’s situation in the workplace).

Claimant voluntarily left work with good cause. She is not disqualified from the receipt of unemployment benefits based on this work separation.

DECISION: Hearing Decision 15-UI-48742 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: December 15, 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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