

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0055

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 103510). Claimant filed a timely request for hearing. On December 16, 2015, ALJ Frank conducted a hearing, and on December 24, 2015 issued Hearing Decision 15-UI-50021, affirming the Department’s decision. On January 11, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify as required by OAR 471-041-0080 (October 29, 2006) that she provided a copy of that argument to the other parties. For that reason, EAB did not consider claimant’s argument when reaching this decision.

FINDINGS OF FACT: (1) Black Forest Restaurant employed claimant as a server from April 1, 1992 until September 14, 2015.

(2) The employer’s restaurant did not have many employees, and there were no supervisors other than the owner and the kitchen manager. The restaurant was very busy and often short-staffed. The pace of work was hectic.

(3) In approximately 2013, the employer hired a particular cook. Beginning in approximately early 2015, that cook began making insulting comments to claimant. The cook had a loud speaking voice that could be heard by the customers in the restaurant. In a loud voice, the cook often called claimant “stupid” or make comments to her such as “[You] don’t know what [you’re] doing.” Audio at ~8:05. The cook regularly took actions for the purpose of annoying claimant, like locking the back door to the restaurant when he knew that claimant usually used that door to enter the restaurant and requiring her to walk around the restaurant to the front door to enter.

(4) The cook also typically behaved in a way that substantially interfered with claimant’s ability to perform as a server and satisfy her customers’ requests, and that required her to confirm the accuracy of

the food prepared by the kitchen against that which she had ordered. The cook would not cook the orders claimant submitted or would take an inordinately long time to prepare those orders. When an order needed to be corrected or re-cooked to meet a customer's preferences, the cook either would refuse or take an excessively long time to do so.

(5) Before September 14, 2015, claimant complained on many occasions to the owner about how the cook treated her and the orders she submitted to the kitchen. When the owner intervened, the cook would briefly stop the behavior that was insulting to claimant or obstructing her in serving her customers. After a short period of time, the cook's former behavior would resume.

(6) September 14, 2015 was the owner's first day away from work on a vacation to Arizona. That day, claimant was working the breakfast shift. When claimant submitted meal order tickets to the kitchen, she discovered that the cook was failing to prepare all of the items ordered, and was plating the orders as if they were fully prepared and ready for her to serve. One order of biscuits and gravy was missing the gravy and another order was missing an over-easy medium egg. Claimant went to the kitchen to address the problem with the cook, but when she tried to do so, the cook ignored her and walked away. Claimant had to go to the back of the kitchen for assistance from the prep cook to obtain correct and complete orders. When the kitchen manager came to work, claimant tried to speak with him about the difficulty she was having that morning getting complete orders from the cook. The kitchen manager, who had just walked through the kitchen, told claimant, "I don't see that there's a problem [with the food preparation]." Audio at ~12:26. The kitchen manager then stated to claimant, "You're the most annoying person that I've ever had to work with." Audio at ~12:32.

(7) After her interaction with the kitchen manager, claimant thought she would be unable to continue working because of the way the cook was treating the orders she submitted, the failure of the kitchen manager to rectify her problems with the cook and the absence of the owner, who had been the only person who was able to control the cook's behavior. Claimant concluded she was going to leave work rather than work in an environment where the cook was unconstrained. On September 14, 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-50021, the ALJ concluded that claimant voluntarily left work without good cause because she failed to show grave circumstances motivated her to quit. The ALJ found that the testimony of the employer's owner – that claimant only began objecting to the cook's behavior after the cook complained to the owner that claimant was not charging customers for all the food they ordered

and that claimant called the cook names -- demonstrated that claimant's situation was not grave. Hearing Decision 15-UI-50021 at 2. The ALJ also reasoned that, because claimant testified that she had not intended to leave when she arrived for work on September 14, 2015, she must have done so solely as a result of being ignored by the cook and the kitchen manager referring to her as "annoying," neither of which the ALJ considered a grave circumstance. Hearing Decision 15-UI-50021 at 3. The ALJ further reasoned that, in lieu of quitting, claimant had the reasonable option of contacting the employer to discuss her concerns. Hearing Decision 15-UI-50021 at 3. We disagree.

At the outset, claimant testified that, although she had not intended to quit before she arrived at work on September 14, 2015, she did not quit because the kitchen manager referred to her as "annoying" or because of the cook's actions only on that day. Audio at ~13:12, ~13:40. Claimant was clear in her testimony that she decided to leave on the day that she did because she concluded that neither the kitchen manager nor the owner were likely to take steps that would control the cook's behavior on a long-term, consistent basis, and she felt that she could no longer tolerate the cook's "overall" mistreatment. Audio at ~16:59. In light of the reasons claimant plainly gave for her decision to leave work, it was not appropriate for the ALJ to focus only on the events on September 14, 2015.

The employer's witness at hearing, the owner of the restaurant, stated vaguely that she was aware of "friction" between claimant and the cook, but failed to describe what she observed about the behaviors of the cook or claimant that might have been emblematic of that "friction." Audio at ~20:14. She did not specifically rebut any of claimant's testimony describing what the cook said to her, how the cook handed food orders she submitted to the kitchen, or the behavior the cook undertook with the apparent purpose of inconveniencing or irritating her. Even if claimant failed to charge customers for all the food they ordered, as the owner asserted, it does not justify the cook's name-calling and insulting behaviors, his taking actions only to inconvenience her and his refusing to cook complete orders or to correct his errors in preparing orders and does not operate to diminish the gravity claimant experienced from such behaviors. The owner also failed to demonstrate that claimant was somehow responsible for the friction between her and the cook because claimant called the cook names. While the owner did broadly state that claimant referred to the cook by some unflattering terms when discussing the cook's behavior with her, she was unable to substantiate this testimony by specifying the name(s) that claimant supposedly called the cook. Audio at ~22:20, ~22:40. Significantly, the owner did not contend that claimant called the cook unflattering names to his face, in front of other people or in a voice loud enough to be heard by the restaurant's customers, which was claimant's testimony about the circumstances under which the cook called her names. Audio at ~7:54, ~8:20. The owner's testimony was insufficient to support the ALJ's implicit conclusion that claimant brought upon herself the types of behavior that the cook subjected her to.

Viewing the record as a whole, claimant showed that the cook openly questioned, if not insulted, her intelligence and job skills in front of others or in a loud enough voice for employees and customers to hear. The cook actively took steps to sabotage claimant in her job by not cooking orders, not correcting orders, or taking an inordinately long time to do either. The cook further subjected claimant to conditions with the intention of annoying her. Claimant presented sufficient specific evidence to establish that the cook's behavior toward her created an oppressive or abusive work environment. *See McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979) (to show good cause for leaving employment, claimants 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). While the ALJ reasoned that, in lieu of quitting, claimant had the reasonable option of contacting the owner before she left work, it was not disputed that the owner was away on vacation on September 14, 2015 and would be gone for some time thereafter. Claimant had spoken to the kitchen manager about the cook's obdurate behavior but, by his comments, he indicated he was unlikely to take any action to halt the cook's behavior. The owner did not dispute that claimant had spoken with her repeatedly about the cook's abusive behavior, and the owner had not been able to correct or control that behavior and it remained ongoing. It was not a reasonable option for claimant to have remained at work and allowed herself to be subjected to abuse until the owner returned from vacation or until, if ever, the kitchen manager rectified the cook's treatment of claimant. On these facts, a reasonable and prudent server who was treated as claimant was by the cook would have left work when claimant did. At the time she left work, claimant showed that her situation was a grave one to which there were no reasonable alternatives.

Claimant showed good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-50021 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 2, 2016

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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