

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0078

Affirmed
Disqualification

PROCEDURAL HISTORY: On November 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80248). Claimant filed a timely request for hearing. On January 11, 2016, ALJ Triana conducted a hearing, and on January 13, 2016 issued Hearing Decision 16-UI-51014, affirming the Department's decision. On January 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument and the entire hearing record.

FINDINGS OF FACT: (1) Portland Prime employed claimant from April 4, 2015 until August 14, 2015 as a restaurant assistant manager.

(2) On August 12, 2015, the owner told claimant he had to put claimant on temporary layoff for approximately one month for business reasons. The start date for the layoff was to be August 14, 2015.

(3) On August 13, 2015, before claimant was on layoff status, the general manager asked claimant to continue working for the next two weeks to cover shifts for an employee who had to miss work during that time to travel to Europe due to his brother's death. Claimant told the general manager he preferred not to work during the next two weeks, but did not provide a final answer to the general manager's request.

(4) On August 14, 2015, the general manager called claimant to confirm whether claimant would work the next two weeks. Claimant told him he did not want to work the next two weeks because he had work available for the next two weeks through his own business, and he preferred to look for other work immediately, rather than wait to job hunt until he was laid off in September. Claimant and the general manager began to argue about the layoff and claimant's job performance. At the end of the argument, the general manager called claimant a "cunt," and hung up on him. Transcript at 13. Claimant was no longer willing to work with the general manager after he called claimant a foul name. The general manager had not called claimant a foul name before August 13.

(5) Later on August 14, 2015, claimant asked the owner for his final paychecks. The employer had continuing work available for claimant at that time. Claimant did not discuss the August 13 argument with the general manager or the owner before he quit.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude claimant voluntarily left work without good cause.

The first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time, but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a). The date an individual is separated from work is the date the employer-employee relationship is severed. *Id.*

Although the employer initially planned to put claimant on a temporary layoff beginning on August 14, he subsequently offered claimant work during the last two weeks of August. Claimant’s layoff date was therefore moved to September 1. Claimant was considering working for the employer during the last two weeks of August until he argued with the general manager on August 14, and the general manager called him a foul name. After that argument, claimant was no longer willing to continue working for the employer. Claimant thus severed the employer-employee relationship, and the work separation occurred, on August 14, 2015 when claimant asked the owner for his final paychecks. The work separation was a quit.

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 employer for an additional period of time.

Claimant left work because he was offended when the general manager called him a foul name during an argument on August 14, 2015. Claimant averred that he could not continue working after that incident because a work environment where a general manager called claimant a name and expected him to continue working with him was an “unhealthy environment.” Transcript at 12. Claimants are not required to endure personal abuse for fear that quitting will disqualify the worker from unemployment benefits. *McPherson v. Employment Div.*, 285 Or 541, 557, 591 P2d 1381 (1979). However, the type of on-the-job abuse considered grave enough to amount to good cause for quitting work are those in which the claimant is subjected to ongoing or egregious conduct such as ongoing unwanted sexual advances and touching despite complaints, ongoing sexual harassment, ongoing verbal abuse, sexist and ageist remarks, fits of temper, hostility and slurs based on membership in a protected class, or assault. *See e.g. Appeals Board Decision 13-AB-0502*, April 2, 2013 (ongoing unwanted sexual advances and touching despite making complaints); *Appeals Board Decision 12-AB-3213*, January 8, 2013 (ongoing sexual

harassment); *Appeals Board Decision* 12-AB-3173, December 14, 2012 (ongoing verbal abuse despite complaints); *Appeals Board Decision* 11-AB-3647, February 9, 2012 (sexist and ageist remarks); *Appeals Board Decision* 11-AB-3308, December 22, 2011 (supervisor's ongoing verbal abuse and fits of temper); *Appeals Board Decision* 11-AB-2864, December 12, 2011 (management's ongoing ageist comments and attitudes); *Appeals Board Decision* 11-AB-3063, October 28, 2011 (corporate culture hostile to women); *Appeals Board Decision* 11-AB-2272, September 6, 2011 (supervisor's regular fits of temper and verbal abuse). In comparison to those types of working conditions that are generally considered hostile and grave, the isolated incident claimant described did not place him at risk for his physical or mental safety or health, or otherwise amount to grave working conditions. Thus, the record fails to show that claimant's working conditions were so grave at the time he quit that he had no reasonable alternative but to quit work.

Even if claimant had quit for reasons considered grave, the preponderance of the evidence shows claimant had the reasonable alternative of notifying the employer's owner about the general manager's conduct. Claimant spoke with the owner to request his final paychecks, and when he received his checks. A reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would not have left work under the circumstances claimant described without, at a minimum, notifying the employer of his concerns and allowing the employer some reasonable period of time to address them.

Claimant quit work without good cause. Claimant is disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-51014 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 8, 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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