

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0090

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 73852). The employer filed a timely request for hearing. On January 15, 2016, ALJ A. Mann conducted a hearing and issued Hearing Decision 16-UI-51208, reversing the Department's decision. On January 25, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new information not offered during the hearing. Claimant did not explain why she did not present this information at the hearing or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond her reasonable control prevented her from doing so. For this reason, EAB did not consider the new information that claimant sought to introduce in her written argument. EAB considered only evidence received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Delta Cleaning Services, Inc. employed claimant on a cleaning crew from July 1, 2015 until September 14, 2015.

(2) When the employer hired claimant, she understood she was going to be assigned only light duty cleaning tasks such as cleaning windows and vacuuming carpets. Initially, claimant was scheduled to work five days each week, from 5:30 a.m. until 9:30 a.m.

(3) Sometime after claimant was hired, the crew lead began to assign heavy cleaning work to claimant such as operating floor scrubbers and buffers and cleaning grocery store aisles. Claimant told the lead she was hired only for light cleaning work and could not readily perform the work he was asking of her. When the lead continued to assign heavy work to claimant, she went to the area manager and he agreed to inform the lead that claimant was hired only for light work. The lead continued to assign heavy cleaning work to claimant.

(4) Sometime in July 2015, claimant's crew lead began sending claimant home when she reported for work, stating that other workers had already done the work assigned to her. Claimant was not paid for a shift when the lead sent her home. On July 29, 2015, claimant called the employer's off-site human resources department to complain about the lead's actions in sending her home without notice. The human resources department referred claimant's complaint to the employer's area manager.

(5) Sometime around the beginning of August 2015, claimant asked the area manager and the crew lead supervisor for more hours and her schedule was changed to five days per week from 3:30 a.m. until 9:30 a.m. Shortly after, claimant asked the area manager and the lead supervisor for still more hours and they agreed she would be scheduled to work from 1:30 a.m. until 9:30 a.m. two days per week and from 3:30 a.m. until 9:30 a.m. three days per week.

(6) After claimant began this new work schedule, on at least five occasions, claimant's lead called her at home late at night when her shift the following day was scheduled to begin at 3:30 a.m. and told her she was expected to report for work at 1:00 or 1:30 a.m. When claimant told the lead he was wrong about the time her shift started, he would insist he was correct and claimant would report for work at 1:00 or 1:30 a.m. Other times, claimant would report for work as scheduled at 1:30 a.m. and the lead would tell her she was not scheduled to start until 3:30 a.m. or she would report as scheduled at 3:30 a.m. and the lead would send her home, stating that her shift actually had been scheduled to start at 1:00 or 1:30 a.m. and other employees were already performing her work. The lead also sent numerous text messages on various topics to claimant at times when she was off work and at home. Claimant repeatedly contacted the area manager and the crew lead supervisor to complain about the lead's behavior and one or both of them would speak with the lead. The managers explained to the lead the days claimant's shift was scheduled to start at 1:30 a.m. and the days it started at 3:30 a.m. By September 2015, the lead was no longer calling claimant at home.

(7) On approximately August 3, 2015, claimant asked the crew lead if she could leave work early on August 10, 2015 for a medical appointment. The lead told claimant she needed to bring to him a physician's note describing her condition and a list of the prescription medicines she was taking before he would allow her to leave work early for the appointment. Although claimant did not think the lead's request was appropriate, claimant later gave the lead a physician's summary of her health conditions from 2010 and the list of her prescribed medications.

(8) In August 2015, after claimant started speaking with the managers about the lead's late night calls to her house or sending her home early without working, the lead began to follow claimant when she left for her lunch breaks. The lead would often "yell" at claimant that she was "trying to get him in trouble [with the managers] and that the managers "weren't [her] boss, he was" and he expected her "to do what [he] told her to do." Transcript at 19. Claimant concluded the lead was "mad" that she had spoken to the managers. *Id.*

(9) Sometime around August 2015, claimant's boyfriend came to the workplace to have lunch with claimant. The lead noticed the boyfriend and commented, "What was he doing there [in the workplace] and if he was kissing [claimant's] ass or something and it was a nice ass to be kissing anyway." Transcript at 27. Once, when claimant was displeased that the lead assigned to her a task that required her to kneel, she stated to the lead as she was kneeling, "There, does that make you happy?" to which

the lead responded, “Well, it would make me happy if you’re doing something else down there.” Transcript at 27.

(10) Sometime in August 2015, the lead began to ask claimant to stay late at work, after the scheduled end of her shift. When claimant stayed late, the lead would ask her to drive him home. The lead also began asking claimant to loan him money. In late August, claimant finally told the lead that she could not stay late anymore because her boyfriend did not like it. The lead stopped asking claimant to stay late, and stopped asking for rides or to borrow money.

(11) On August 7, 2015, claimant spoke with the employer’s human resources department and inquired about filing a sexual harassment complaint against the lead. A representative from that department told claimant to “send in proof.” Transcript at 22.

(12) In approximately late August 2015, claimant complained to the area manager and the crew lead supervisor that the lead was continuing to tell her that she had reported at the wrong time for shifts and sending her home. Claimant also told the manager that the lead kept sending her text messages at times when she was not at work. Claimant told both managers that she was going to quit if the situation with the lead was not resolved. Transcript at 4.

(13) On approximately September 11, 2015, when claimant reported for work, the lead had assigned other employees to perform claimant’s work that night and told claimant to go home. When claimant protested, the lead commented that he was sending her home because “[she] was a girl” and she thought “shouldn’t have to do hard work [like that which the lead wanted to assign to her].” Transcript at 22. Claimant continued to protest, but went home without working.

(14) On approximately September 12, 2015, the lead sent forty-five text messages to claimant. The messages stated in substance that claimant only wanted an “easy job because [she was] a girl.” Transcript at 7. Other messages showed an image of a disabled parking space and an able-bodied girl who was wearing a skirt parking a car in a regular parking space. The images were accompanied by a text that stated claimant “wanted and expected” the type of easy job suitable for a disabled person or the female figure depicted. Transcript at 7-8. That day, claimant informed the regional manager and the crew lead supervisor of the lead’s behavior, his comments and showed them the text messages. They advised claimant to file sexual harassment charges against the lead and told her she could prepare the complaint during work hours. When claimant tried to work on the complaint during her shift, the lead told her she was not allowed to do so and to “do it on your own time.” Transcript at 8.

(15) On approximately September 14, 2015, the next workday, claimant notified the employer that she was leaving work. Claimant quit because she could not tolerate the lead’s behavior any longer. At the time claimant quit, the lead had stopped asking her for rides and money and had stopped calling her at home about her schedule. The lead had not stopped sending claimant home from work or making comments or sending communications to claimant that she considered offensive.

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/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 16-UI-51208, the ALJ found, as fact, that after the area manager and the crew lead supervisor spoke to claimant’s lead most of claimant’s objections to the lead’s behavior had been resolved. Hearing Decision 16-UI-51208 at 2. The ALJ concluded claimant did not show good cause for leaving work when she did, reasoning that she did not show that her situation was grave and, alternatively, she did not pursue the reasonable alternative of filing a sexual harassment complaint with the employer’s human resources department before she quit. Hearing Decision 16-UI-51208 at 3. We disagree.

The employer did not dispute claimant’s account of the lead’s behaviors, or that claimant repeatedly contacted the area manager and the crew lead supervisor as the lead’s behavior she found offensive evolved into new forms. Viewed objectively, the lead’s behaviors toward claimant up to the time she left work were insulting, degrading, appeared intended to annoy, inconvenience, take advantage of her and exhibited a strong gender bias. A reasonable and prudent female employee would have found such treatment from a male lead worker to constitute an objectively grave situation. While, as the ALJ pointed out, the area manager and the crew lead supervisor were able to stop some of the lead’s behaviors after claimant’s complaints, the lead’s offensive actions were persistent, and the lead reacted to the supervisors’ interventions on claimant’s behalf by engaging in new types of offensive behavior. It does not appear that the supervisors were able to restrain the lead for any significant period of time from his continuing efforts to subject claimant to abuse.

Although from claimant’s actions, she was presumably aware of the existence and function of the employer’s human resources department, that awareness does not, as the ALJ inferred, automatically lead to the conclusion that her failure to file a sexual harassment complaint with that department indicates that she did not exhaust all reasonable alternatives before deciding to leave. Hearing Decision 16-UI051208 at 3. Viewed in context, on the day she quit, claimant had endured various forms of abuse from the lead for two and a half months. On September 11, the lead had once again sent her home before she could begin working because she was a “girl” and “didn’t want to do hard work.” When claimant protested his actions, the lead responded the next day by sending her forty-five text messages of gender-based ridicule. Transcript at 22. While claimant did inform the area manager and the crew lead supervisor of the lead’s most recent behavior, she construed their advice – to file a complaint with human resources -- as their surrender to the lead, giving up on their efforts to halt his behavior and diverting the issue to an off-site human resources department. Under these circumstances, a reasonable and prudent employee in claimant’s situation would have decided that filing a complaint against the lead was not a reasonable alternative to quitting since the employee would need to continue to withstand the lead’s behavior for an uncertain period while the human resources department investigated the complaint. On these facts, given the persistent and pernicious nature of the lead’s behavior, a reasonable and prudent employee would have left work rather than endure further abuse from the lead.

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

DECISION: Hearing Decision 16-UI-51208 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell

DATE of Service: February 17, 2016

NOTE: This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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