

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0144

Reversed
No Disqualification

PROCEDURAL HISTORY: On October 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 131537). Claimant filed a timely request for hearing. On January 21, 2016, ALJ Shoemake conducted a hearing, and on February 1, 2016, issued Hearing Decision 16-UI-52974, affirming the administrative decision. On February 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Hot Lips Pizza employed claimant as a delivery driver from October 8, 2014 until September 10, 2015.

(2) When claimant worked for the employer, he was in the process of transitioning from the male to female gender. Claimant's coworkers were aware of this process because of claimant's appearance, behavior, and mannerisms. Claimant also talked with his coworkers about his "queer" status, *i.e.*, his status as a member of the lesbian, gay, bisexual and transgendered community. Audio Recording at 21:09.

(3) Approximately four months before claimant separated from his work for the employer, a coworker deleted claimant's name from the list of contacts on the blue tooth device in the company car that claimant and other employees used to deliver pizza. The coworker substituted the phrase "annoying fag" for claimant's name as a contact on the blue tooth device. Audio Recording at 11:47.

(4) Approximately three to four months before claimant separated from his work for the employer, claimant's coworkers were listening to music that included dialogue in which the performer referred to "faggots." Claimant overheard his coworkers laughing at this reference.

(5) Approximately one month before claimant separated from his work for the employer, claimant overheard a coworker talking with another coworker about Caitlin Jenner, a person who transitioned from the male to female gender. Claimant's coworker told another coworker that if he ever discovered a woman with whom he was having sexual relations was transgendered he would "kick her ass." The

coworker to whom this comment was made agreed with the remark. Audio Recording at 16:44 and 23:07.

(6) During the last month of his work for the employer, claimant felt uncomfortable and unsafe in the workplace because of the transphobic remark of his coworker. The thought of going to work made claimant physically ill and he felt nauseated when he reported for his scheduled shifts.

(7) In late August or early September 2015, claimant contacted the hiring manager in the employer's human resources department and told the manager about his coworkers' inappropriate remarks. The hiring manager asked claimant who was making these comments. Claimant refused to identify these individuals because he was afraid they would retaliate against him. Claimant asked the hiring manager what other options were available to solve the problems he was experiencing, and the hiring manager offered none. Claimant then suggested that the employer lay him off. Audio Recording at 12:58.

(8) After his conversation with the hiring manager, the employer's general manager called claimant. Claimant told the general manager he was uncomfortable in the workplace, and asked the general manager about options available to resolve the situation. When the general manager was unable to offer claimant any options, claimant suggested that the employer lay him off. The general manager subsequently agreed with claimant's proposal and removed claimant from the work schedule, effective September 10, 2015. Claimant no longer performed any work for the employer after that date.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with good cause.

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).

Claimant's work separation occurred because he and the employer agreed to end the employment relationship. Had claimant not proposed that the employer lay him off, claimant could have continued to work for the employer. Claimant was the moving party who initiated the work separation, and the record demonstrates that it would not have occurred but for his request that the employer lay him off. The work separation was therefore a voluntary leaving.

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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

Claimant, who was in the process of transitioning from the male to female gender, quit his job because he was uncomfortable with a work environment in which coworkers made homophobic and transphobic remarks. In Hearing Decision 16-UI-52074, the ALJ found that claimant "failed to show that the

general comments made by his coworkers amounted to a situation so grave as to leave him no reasonable alternative but to leave work.” Hearing Decision 16-UI-52074 at 2. The ALJ concluded that claimant had the reasonable alternatives of providing the names of his offending coworkers to the employer, speaking to the employer’s human resources department, or requesting a transfer. *Id.* We disagree.

The substitution of “annoying fag” for claimant’s name as a contact in the employer’s blue tooth device provided a provided a reasonable basis for claimant to conclude that his coworkers’ comments were not “general” and were directed at him, an individual whose behavior, appearance, and mannerisms identified him as a transgendered person. Even if the inappropriate comments of his coworkers were not specifically addressed to claimant, however, they were sufficiently hostile and offensive so as to create an environment in which claimant became physically ill at the thought of going to work, and felt nauseated when he worked his scheduled shifts. Based on this record, we conclude that claimant faced a grave situation in the workplace.

In regard to alternatives available to claimant, we find reasonable claimant’s fear of retaliation if he disclosed the names of the individuals who made offensive remarks. Contrary to the ALJ’s assertion, claimant spoke to the hiring manager in the employer’s human resources department, and also spoke to the employer’s general manager about the workplace problems he was experiencing. Although claimant questioned both these individuals about available options, neither person offered claimant any alternative, other than asking him to name the employees who had offended him. Under these circumstances, it was not reasonable for claimant to ask about a transfer; the managers would presumably have told him about such an option had it been available.

In sum, we conclude that claimant faced a grave situation that left him no reasonable alternative but to quit his job. Claimant voluntarily left work with good cause and is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-52074 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. H. Hettle, not participating.

DATE of Service: February 29, 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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