

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0189

Affirmed
Disqualification

PROCEDURAL HISTORY: On December 16, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 71106). Claimant filed a timely request for hearing. On January 14 and 29, 2016, ALJ Vincent conducted a hearing, and on February 4, 2016, issued Hearing Decision 16-UI-52385, affirming the administrative decision. On February 19, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EVIDENTIARY MATTER: At the January 14, 2016 hearing, ALJ Vincent admitted documents submitted by the employer into the record as Exhibit 1. On this record, however, the exhibit admitted was not marked. We have therefore marked Exhibit 1 based on the ALJ's description. Exhibit 1 consists of the following 20 pages: a fax cover sheet; a September 24, 2015 letter from the employer to claimant (1 page); a July 31, 2015 memorandum from the employer to claimant (3 pages); time detail reports for claimant from April 20 through September 27, 2015 (12 pages); a September 23, 2015 email from claimant (2 pages); and a list of Kronos Timekeeping Pay Codes (1 page).

FINDINGS OF FACT: (1) Oregon Health Science University employed claimant as an anesthesia technician from April 25, 2011 until September 23, 2015. Claimant worked a night shift, from 7 p.m. to 7:30 a.m.

(2) Claimant has a hormone deficiency. As a result of this condition, she often suffers from headaches and exhaustion that make it difficult or impossible for her to work. Claimant never requested that the employer make any reasonable accommodations for her hormone deficiency.

(3) On March 15, 2014, claimant agreed to change her shift assignment from nights to days. Claimant subsequently changed her mind, however, when she learned if she worked day shifts, she would no longer receive a pay differential. Claimant told her manager she was rescinding her agreement to change her shift assignment.

(4) In May 2014, claimant and a representative from the employer's human resources department agreed that claimant would take an hour lunch and rest period from 9 to 10 p.m.; this hour would include her 30 minute lunch period combined with two of her 15 minute rest breaks. Claimant would then take an additional 15 minute rest break between 12 p.m. and 7:30 a.m. This schedule was necessitated by the employer's staffing patterns and the inherently unpredictable nature of the work claimant performed -- caring for trauma patients. Because there were few or no staff members available to replace claimant during her shift, and because she might be needed to assist in a trauma situation at any time, she was expected to carry a pager during her rest breaks. If a rest break was interrupted by the need to care for a patient, the employer expected that claimant would provide whatever assistance was needed and then, if possible, resume her break. If claimant was unable to take a rest break, the employer instructed her to enter this time on her time sheet so that she would be paid for the missed rest break. 1/29/16 Transcript at 5 and 6. The lunch and break schedule to which claimant agreed was consistent with the terms of the applicable collective bargaining agreement.¹

(5) At an August 7, 2014 meeting of claimant's work group, claimant's supervisor told those attending that he no longer needed any one to volunteer to cover claimant's night shift. Claimant complained to her supervisor about his comments at this meeting, because she believed that it had caused her coworkers to resent and "ostracize" her. 1/29/16 Transcript at 14.

(6) On October 2, 2014, the employer granted claimant use of intermittent leave until October 2, 2015 under the Family Medical Leave Act (FMLA) and Oregon Family Leave Act (OFLA). Because claimant failed to provide required documentation to the insurance company that administered the leave, approval of her request to use vacation leave for a portion of the time she was on FMLA and OFLA protected leave was delayed.

(7) Claimant's supervisor doubted the validity of the medical certification claimant provided to justify this leave, and on October 14, 2015, asked that claimant obtain a second medical opinion regarding the need for the leave.² The supervisor eventually dropped his request for a second opinion, and claimant was never required to obtain one.

(8) On November 13, 2014, claimant's supervisor orally coached her about inappropriate behavior for using an electronic device while she was lying on a patient stretcher. This oral coaching did not constitute discipline. 1/29/16 Transcript at 24.

(9) On March 2, 2015, the employer gave claimant a "verbal written warning" for violations of its attendance policy. 1/29/16 Hearing Transcript at 24. A "verbal written warning" is the first level of discipline under the provisions of the applicable collective bargaining agreement.

¹ OAR 839-020-0050, Appendix A (January 1, 2014) requires that an employer provide an employee who works a 12 and ½ hour shift with two 10 minute rest breaks and a 30 minute meal period during the employee's shift. The provisions of this rule may be modified by a collective bargaining agreement that specifically prescribes rules regarding meal periods and rest breaks, however. OAR 839-020-0050(7).

² Under 29 CFR § 825.307(b), an employer who has reason to doubt the validity of a medical certification may require that the employee obtain a second opinion at the employer's expense.

(10) On March 5, 2015, the employer gave claimant a “verbal written warning” for her failure to meet performance standards by refusing a coworker’s request for assistance on January 1, 2015. 1/29/16 Transcript at 17.

(11) Sometime prior to May 20, 2015, claimant filed a complaint with the Oregon Bureau of Labor and Industries (BOLI). In her complaint, claimant alleged that the employer harassed or discriminated against her by failing to accommodate her disability, attempting to force her to change her shift assignment, demanding that she obtain a second opinion regarding her need for FMLA and OFLA leave, causing her coworkers to ostracize her because of comments made at the August 7, 2014 staff meeting, and disciplining her on March 5, 2015 for refusing to perform a colleague’s work. 1/29/16 Hearing Transcript at 11 through 19.

(12) On June 4 and 5, 2015, claimant was absent from work without prior authorization. On July 31, 2015, the employer gave claimant a “verbal written warning,” asserting that these absences violated its attendance policy.

(13) On September 11, 2015, claimant’s supervisor and other managers met with claimant to investigate claimant’s violations of the employer’s attendance policy, and to investigate a complaint that claimant had failed to transport a patient when asked her to do so. The employer intended to issue claimant a written warning for these incidents. 1/29/16 Transcript at 22. A written warning is the second level of discipline under the provisions of the applicable collective bargaining agreement. Claimant was very upset by this meeting because she believed that her supervisor was unfairly accusing her of refusing to comply with an order given by a coworker who had no authority to give the order. 1/14/16 Hearing Transcript at 25.

(14) On September 23, 2015, claimant voluntarily quit her job because she believed that the employer had created a hostile work environment and that her supervisor harassed her.

CONCLUSION AND REASONS: We agree with the ALJ and conclude that claimant voluntarily left work without 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 P2d 722 (2010). Claimant has the burden to show that she quit work when she did with good cause as defined by OAR 471-030-0038(4). *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Claimant has hormone imbalance, a permanent or long-term “physical or mental impairment” as defined at 29 CFR §1630.2(h). A claimant with that impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

Claimant quit her job because she believed that the employer had created a hostile work environment and that her supervisor harassed her. She testified that her supervisor targeted her because of her use of protected leave under FMLA and OFLA, that he subjected her to “weekly disciplinary hearings,” that he attempted to “force her off her shift,” and that he caused her coworkers to resent her by telling them at an August 2014 meeting that he needed someone to take claimant’s shift. 1/14/16 Hearing Transcript at 5 and 1/31/16 Hearing Transcript at 14. In regard to her hostile work environment, claimant asserted that the employer refused to accommodate her medical condition, denied her a break “every night” she worked, and required that she handle “hazardous materials.” *Id.*

The evidence appears to be equally balanced in regard to claimant’s absences from work, her ability to take breaks during her shift, and her supervisor’s comments at the August 2014 meeting. The employer asserted that the “verbal written warnings,” the lowest form of disciplinary action, it gave claimant on March 2 and 5, and July 31, 2015, had nothing to do with her use of protected leave. Claimant, however, contended that the employer took these disciplinary actions against her in retaliation for her use of FMLA and OFLA protected leave. Claimant testified that she was routinely denied the right to take lunch periods or rest breaks during her shifts in violation of the law. The employer, however, asserted that the lunch and break schedule was one to which claimant agreed and was lawful under OAR 839-020-0050(7) because it was consistent with the terms of the applicable collective bargaining agreement. In regard to the August 2014 meeting, claimant asserted that she was “ostracized” by her coworkers because the supervisor announced that that he needed someone to take her shift. The supervisor denied making this statement, testifying that he told employees that he no longer needed a volunteer to cover claimant’s shift. 1/31/16 Hearing Transcript at 14. On this record, the evidence concerning these matters is no more than equally balanced. The claimant therefore failed to meet her burden to show that she was denied lunch period or rest breaks, that she was disciplined in retaliation for her use of protected leave, or that she was resented by her coworkers because of her supervisor’s statement at a meeting.

The evidence does not support claimant’s contentions regarding the other reasons she provided for her decision to voluntarily leave work. In regard to any attempts to “force her off her shift,” claimant never challenged the employer’s evidence that she voluntarily agreed to work the day shift in March 2014, and subsequently changed her mind about the shift change only when she learned she would no longer receive a pay differential. In regard to “weekly disciplinary hearings” claimant alleged the employer conducted, she did not rebut testimony of the employer’s witnesses that the only discipline the employer administered to her were three “verbal written warnings” on March 2 and 3, 2015, and July 31, 2015. On September 15, 2015, the employer planned to give claimant a written warning, the second highest level of disciplinary action, for violating its attendance policy and performance expectations. Claimant quit her job before the employer imposed this discipline, however. Finally, claimant offered no evidence that she was required to handle “hazardous materials,” or that she requested and was denied any type of accommodation for her hormone imbalance.

In sum, claimant failed to meet her burden to prove conditions that demonstrated a hostile work environment or unfair harassment by her supervisor. A reasonable and prudent person who suffered from hormone imbalance would not conclude that the circumstances claimant faced created a situation so grave that it left her no alternative but to voluntarily leave work. Claimant therefore quit her job without good cause and is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-52385 is affirmed.

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

DATE of Service: March 7, 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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