

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0688

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 130447). Claimant filed a timely request for hearing. On May 24, 2016, ALJ Shoemake conducted a hearing, and on May 31, 2016, issued Hearing Decision 16-UI-60697, affirming the administrative decision. On June 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record, including a letter from her doctor. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information only if the party offering the information demonstrates that factors or circumstances beyond party's reasonable control prevented the party from offering the information during the hearing. Claimant provided no reason why she did not offer the information contained in her written argument at the hearing other than stating that she did not offer the letter from her doctor because she "did not think it was necessary." Written Argument at 6. With no explanation why claimant thought it unnecessary to provide the note from the doctor at the hearing, and with no explanation why she did not provide the other information in her argument at the hearing, we have no reason to conclude that circumstances beyond claimant's reasonable control prevented her from doing so. We therefore considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Three Rivers Casino employed claimant as a banquet server from September 17, 2007 until January 2, 2016.

(2) Sometime prior to January 2016, claimant began to occasionally have attacks in which she experienced numbness in her arms, had difficulty breathing, and felt sharp pains in her stomach and a "rubbery" sensation in her feet. Audio recording at 18:28. Claimant consulted her doctor, and underwent numerous tests. The doctor told claimant that he was unable to find any specific cause for

these attacks, but that they were probably caused by stress. The doctor advised claimant to avoid stressful situations. Audio recording 19:44.

(3) On January 2, 2016, claimant was scheduled to serve at the employer's "Seafood Night" event. Prior to the start of the shift which claimant was scheduled to work, a manager met with the servers and explained that on special evenings, such as "Seafood Nights," the servers would contribute a percentage of the tips they received to a "tip pool" that would be then be divided equally among the bussers. Audio recording at 35:12.

(4) Toward the end of her shift on January 2, 2016, claimant's supervisor asked that she give the supervisor \$25, which represented approximately 26% of the tips claimant had received for the evening. Claimant told the supervisor that she thought this was unfair, because normally she was only required to contribute 10% of her tips to the "tip pool." Claimant gave the supervisor the money she had requested and went to check on the few customers that were left in the area where she had been working. Claimant then began to talk to one of the new bussers, telling him that she had tipped him well. The busser said that he had a problem with the amount of tips he had received. Claimant knew that he was referring to an evening when she did not tip him because she believed the busser had not adequately performed his job. Claimant and the busser then argued about the quality of the busser's work. Claimant began to feel ill from the stress of the situation and decided she was going to quit. Claimant was unable to find her supervisor, however, and stepped outside of the area where she had been working.

(5) After claimant went outside, her supervisor came outside to talk with her. Because other employees overheard claimant's argument with the busser and reported it to the supervisor, the supervisor intended to suspend claimant, pending an investigation into the situation with the busser. When the supervisor attempted to tell claimant that she was being suspended, claimant told the supervisor that she was quitting. Claimant then went back to the work area, clocked out, took her purse, and left. Claimant never returned to work for the employer after January 2.

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). An individual who has, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h) 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. The record fails to show that the stress-induced symptoms which claimant occasionally experienced constituted a permanent or long-term physical impairment. We will therefore assess claimant's decision to voluntarily leave work under the general standard of OAR 471-030-0038(4).

At the hearing, claimant testified about a number of reasons why she disliked her job, including unfair treatment she believed she received after a 2012 accident and an inability to communicate with her supervisor. She decided to quit her job, however, at the end of her January 2, 2016 shift, after she had protested the amount of her tips she was required to contribute to the “tip pool,” and engaged in an angry argument with a busser. We will therefore consider the events of January 2 as the proximate cause of claimant’s decision to voluntarily leave work.

To the extent that claimant quit her job because she believed the employer’s “tip pool” policy was unfair, she failed to demonstrate that she faced a grave situation. Claimant did not show that the policy to which she objected, which the employer implemented only on “special evenings,” had a significant or substantially adverse effect on her earnings. To the extent that claimant quit her job because of the physical symptoms she experienced after arguing with the busser, she failed to demonstrate good cause for quitting her job. Claimant had endured these occasional stress-induced attacks in the past, but had apparently been able to recover from the attacks and continue working for the employer. Based on this record, we conclude that claimant had the reasonable alternative of asking for time off to recover from the attack she experienced on January 2.

Because claimant did not demonstrate that the events of January 2 created a grave situation that left her no alternative but to quit her job, she voluntarily left work without good cause. She is disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 16-UI-60697 is affirmed.

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

DATE of Service: July 18, 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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