

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0793

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 19, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 801118). Claimant filed a timely request for hearing. On June 23, 2016 ALJ Vincent conducted a hearing, and on June 30, 2016 issued Hearing Decision 16-UI-62917 concluding that claimant had good cause to voluntarily leave work. On July 6, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Dragonberry Produce, Inc. employed claimant from February 17, 2014 until March 16, 2016, last as a logistics coordinator.

(2) Throughout claimant's employment, one of her coworkers, James, was the brother of the employer's owner, Amy. Amy and James had a volatile relationship, and James often yelled openly at Amy when he did not agree with her. Staff meetings often devolved into situations where Amy and James were "in each other's face absolutely screaming and pounding on the [conference] table." Audio at ~16:23. After such meetings, Amy would ask claimant why James was so rude and disrespectful to her. Audio at ~17:08. Claimant had no answer to this question. James's and Amy's behavior did not change.

(3) Throughout claimant's employment, James routinely referred to customers and coworkers using terms that were generally considered disparaging and racially offensive. Although there were no African Americans in the workplace, "every third word out of James's mouth was nigger, nigrah or negro." Audio at ~9:36. In reference to his customers, James would frequently say to coworkers such

things as, “If the fat nigger bitch [a customer] calls again, put her through to me because I want to talk with her.” Audio at ~9:36. James would often say things to his white coworkers like, “You nigger, did you get the job done?” Audio at ~ 9:44. James also frequently used “nigger” in emails he sent to his coworkers, such as, “You nigger I told you I wanted this done” or “Nigger, be here at 6:30 in the morning.” Audio at ~10:16. Others of claimant’s coworkers modeled themselves on James and also began to freely and often use the word “nigger” in the workplace. Claimant told the coworkers and James that she very much disliked the use of “nigger” in the workplace and thought it was offensive in an office environment. The coworkers stopped using the word, but James did not despite claimant’s frequent requests. Claimant told Amy that she considered James’s regular use of “nigger” offensive and hostile, but James continued using the word.

(4) Throughout claimant’s employment, she and the owner, Amy, were the only females in the workplace. James and claimant’s male coworkers commonly used “fuck” in the workplace toward each other and the employer’s customers. The atmosphere in the workplace was “in your face” and James and claimant’s coworkers “screamed” and shouted on a regular basis such things as “Well, you didn’t fuck things up too much today, did you?” Audio at ~5:00. Claimant complained to James, the coworkers and Amy about the style of communication in the office, her dislike of the frequent use of “fuck,” and her belief that it was offensive. James and the coworkers did not stop yelling and screaming or using “fuck” commonly in the workplace.

(5) During claimant’s employment, she observed on several occasions that James became manipulative if his preferences, rather than Amy’s were not followed even though she was the owner and he had no formal supervisory role. James would retaliate against coworkers if they did not comply with his wishes rather than Amy’s. For example, James disagreed with the actions of two coworkers who had decided to report early for work to ensure that they completed their work the next day. James instructed all of the coworkers except the one who had proposed coming in early, not to arrive early and told them not to inform the coworker that he had countermanded the coworker’s decision, ensuring that the coworker would arrive early but be unable to begin work. Later, when the coworker tried to discuss with James what had happened, James told the coworker, “Don’t mess with me. I will come back and get you.” Audio at ~ 13:53. James also sometimes interfered with claimant’s scheduling duties and demanded claimant give preference to the orders of his customers rather than scheduling deliveries in a manner that was efficient for the employer. Claimant did what James wanted because she was afraid of retaliation from James. Claimant told Amy that James, a non-supervisor, was issuing orders in the workplace that often conflicted with the Amy’s instructions or the employer’s interests, and she and her coworkers were following James’s instructions because they feared retaliation from James. James’s retaliatory behavior did not stop.

(6) By December 2015, the pressure that claimant experienced from working around James and in the environment he created in the workplace caused claimant to seek an evaluation from her physician. The physician diagnosed claimant with depression and anxiety. The physician prescribed medication to treat both conditions and referred claimant to a therapist. Claimant began seeing the therapist regularly in the hope she would learn how to deal better with the workplace atmosphere.

(7) By March 2016, James was still behaving as he wished in the workplace, the workplace yelling and screaming and the language used had not changed, and James continued to engage in behaviors to punish coworkers who did not follow his wishes. Claimant decided she could no longer tolerate the

workplace environment and told Amy she was quitting due to James's behavior that had been continuing unabated.

(8) On March 16, 2016, claimant voluntarily left work.

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 her employer for an additional period of time.

While OAR 471-030-0038(4) sets out a modified standard for showing good cause to leave work if a claimant had a permanent or long-term physical or mental impairment when she decided to quit, it was not clear on this record whether claimant's depression and anxiety was permanent or long-term or whether it was only temporary. EAB need not and does not consider this issue given the disposition of this case applying the general standard for showing good cause for leaving work.

The employer's witness at hearing did not persuasively rebut claimant's testimony about the type of discourse in the workplace, the yelling and screaming or James's retaliatory behavior. The witness conceded "fuck" was a common expression in the "industry and, while he testified he was aware of James using the word "nigger" with one of his customers, he admitted he was not aware of what went on generally in the workplace because he was upstairs. Audio at ~21:59, ~22:56, ~24:28. As such, the witness was unable to credibly challenge claimant's testimony about James's language or his retaliatory behavior if he was crossed. Audio at ~24:28. Accepting claimant's description as accurate, claimant painted a picture of a workplace pervaded with foul, offensive and aggressive language and retaliatory behavior that claimant was unable to change by complaining repeatedly to James, the other coworkers or Amy. In *McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (1979), the Court held that claimants should not be required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits. While in this case claimant was not personally disparaged or targeted for personal abuse in the workplace, she need not be in order to establish an oppressive situation when the omnipresent workplace atmosphere is one of generalized hostility, disparagement and retaliation. It was reasonable for claimant to conclude that, having tried to ameliorate the situation by unsuccessfully complaining to James and Amy, any further attempts to do so likely would be futile. Given the insidious and enveloping nature of the hostility in this workplace environment, a reasonable and prudent person of normal sensitivity would have concluded that she needed to voluntarily leave work.

Claimant met her burden to show good cause for leaving work when she did. She is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-62917 is affirmed.

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

DATE of Service: August 10, 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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