

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1060

Reversed
No Disqualification

PROCEDURAL HISTORY: On July 29, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131622). Claimant filed a timely request for hearing. On September 9, 2016, ALJ M. Davis conducted a hearing in which the employer did not participate and issued Hearing Decision 16-UI-67227, affirming the Department's decision. On September 13, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Head & Neck Surgical Associates PC employed claimant as an oral surgery assistant from June 29, 2012 to June 8, 2016.

(2) In approximately mid-2015, claimant's physician diagnosed her with depression. The physician prescribed medication to treat her condition. Claimant participated in therapy with a licensed therapist. Claimant experienced symptoms of depression throughout the remainder of her employment.

(3) Claimant regularly did not get lunch breaks. On March 1, 2016, claimant worked for over six hours without a break or opportunity to eat or drink water. She asked her coordinator for a break. The coordinator stated, "No, I don't know what else to tell you. Nobody else has had a break." Audio recording at ~ 16:45.

(4) Claimant continued speaking with the coordinator and eventually convinced her to allow claimant to take a break that day. After claimant returned from her break the coordinator's behavior toward claimant

changed. The coordinator refused to speak with claimant, except for abrupt one-word answers. She once "shoulder checked" claimant when they passed in a hallway. Claimant felt intimidated.

(5) Claimant sent a text message to the office manager asking to speak with her. The office manager agreed to speak with claimant the following morning. Claimant asked, "Can I leave with your permission?" Exhibit 1. The office manager replied, "Ok go home and clear your head we will talk tomorrow" and "Go home rest and clear your head tomorrow at some point we will sit down and get through this . . ." *Id.* The office manager did not instruct claimant to check with anyone else before leaving. Claimant left work for the day.

(6) On March 2, 2016, claimant sent text messages to the office manager about setting up the meeting, stating in one message, ". . . there are things that [the coordinator] did that are unprofessional and technically illegal." Exhibit 1. The office manager replied that she planned to talk with claimant and the coordinator. Claimant asked if the meeting would include both of them at the same time, and the office manager said it would. Claimant replied that she was not comfortable with that, but the office manager insisted, stating, "you have made this an urgent issue she is your Coordinator [*sic*] per office policy you go to your Coordinator [*sic*] first and we include her [*sic*] are you deciding that you do not want to work here?" Exhibit 1. Claimant explained that because her issue was with the coordinator she wanted to meet separately. The office manager replied, ". . . You are paid to work here and you both cannot work together like this [the coordinator] is aware there is an issue and so are you I need to get this dealt with this a.m. you need to work with me on this or how can I support you." Exhibit 1.

(7) Prior to the meeting, the office manager and coordinator met privately and discussed the events of March 1, 2016. During the meeting on March 2, 2016, claimant was not allowed to explain what had happened from her perspective. Claimant tried to explain that she was not getting lunch breaks as required by law, but was not allowed to state her concerns. Claimant was instead criticized for not clearly communicating her desire for a lunch break to the coordinator. At one point she asked permission to record the meeting, but the office manager refused.

(8) In the last half of March 2016, a coworker approached claimant with complaints about the coordinator. Claimant suggested that the coworker discuss her concerns with the coordinator and did not respond with her own complaints. The coworker subsequently made a false report to management that claimant had complained about or criticized the coordinator.

(9) On March 29, 2016, the office manager and coordinator issued claimant a verbal warning for, among other things, leaving work on March 1st without checking out with the coordinator "as per your instructions," "demand[ing]" a meeting on March 2nd, "threaten[ing]" to record that meeting, and complaining about the coordinator to her coworker. Exhibit 1. Claimant disagreed with the warning but was required to sign it. She concluded that it was undeserved because she was never instructed to check out with the coordinator before leaving work on March 1st, asked for but did not demand a meeting on March 2nd, asked but did not threaten to record the March 2nd meeting, and had not complained about the coordinator to a coworker. Claimant felt that the warning was retaliatory and that she was being unfairly targeted.

(10) After the March 29, 2016 warning claimant continued to feel animosity from the coordinator. Claimant continued not to receive all of her lunch breaks. Claimant had no one else to whom she could

complain about those conditions because the office manager was the highest level of authority in her office, had refused to hear her complaints, and had issued her a warning based on her request to meet to disclose the coordinator' unprofessional and illegal conduct.

(11) Claimant's therapist observed that claimant was "highly anxious, sleep impaired, and showing increased depressive symptoms." Exhibit 1. The therapist advised claimant to look elsewhere for work. Claimant sought work, but was unable to find a new job despite looking for several months.

(12) One workday in late May 2016, claimant was unable to take a lunch break. Claimant submitted a time card that reflected that she had not taken the break. After reviewing her time card, the office manager accused claimant of lying about not taking a break. Claimant was very upset by the accusation, felt targeted by the office manager, and decided she was going to quit work. The following day the office manager found out that claimant had not lied on her time card and retracted the accusation.

(13) On June 8, 2016, claimant submitted a letter announcing her intent to resign effective June 21, 2016. Later that day, the office manager called claimant and instructed her to gather her things and leave immediately. The office manager did not tell claimant why she was not going to be allowed to work throughout her notice period.

CONCLUSIONS AND REASON: We disagree with the ALJ and conclude that the employer discharged claimant, but not for misconduct.

ORS 657.176(8) provides that when an individual gives notice of her intent to quit work without good cause, and is discharged, but not for misconduct, within 15 days prior to the planned voluntary leaving date, the work separation is adjudicated as if the discharge did not occur, except the individual is eligible for benefits for the period including the week of the discharge through the week prior to the week of the planned voluntary leaving. Because that law is only applicable to an individual whose planned voluntary leaving was without good cause, we turn first to that issue.

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 P3d 722 (2010). Claimant had depression for a year, which may be considered 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.

The ALJ found that claimant planned to "quit work because she felt the employer was trying to find ways to discipline her or discharge her," and did not have good cause to quit for that reason. Hearing Decision 16-UI-67227 at 3. The ALJ reasoned that although that might have frustrated or concerned her, she did not establish that it created a grave situation, particularly given that claimant continued to work for the employer for a few weeks. *Id.* at 3-4. We disagree.

According to claimant's letter of resignation and testimony, claimant did not quit work merely because she thought she was targeted for discipline or discharge, but because she felt intimidated by her coordinator, was repeatedly denied lunch breaks and was mistreated when she tried to complain about it. Oregon law requires that "every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties." ORS 653.261(1); OAR 839-020-0050(2)(a). Oregon law also requires that an employer claiming exemption from the requirement because providing a meal period would impose an "undue hardship" "shall instead provide the employee adequate paid periods in which to rest, consume a meal, and use the restroom." OAR 839-020-0050(5)(a).

In this case, claimant was regularly denied lunch breaks. She described working for more than six hours at a time without being allowed the opportunity to eat or drink water. She provided unrefuted evidence that that condition was ongoing. Regardless whether the employer might have been exempt from providing employees with meal periods consisting of 30 continuous minutes, the conditions claimant described were unlawful under Oregon law because she was not provided with *any* opportunity to eat or drink during shifts of over six hours.

In March 2016, the employer placed responsibility for not getting lunch breaks on claimant, telling her that she had not communicated clearly enough with the coordinator about her desire for a lunch break. However, Oregon law requires that "every employer shall provide" lunch breaks, thereby placing the responsibility primarily on the employer, and not on claimant. Moreover, the record shows that claimant specifically asked her coordinator for a lunch break on at least one occasion and was told, "No, I don't know what to tell you. Nobody else has had a break." The record fails to show that claimant should or could have been clearer in her requests for meal breaks.

It is unreasonable to expect claimant to complain to the coordinator about the lack of lunch breaks, as her request to the coordinator resulted in abrupt treatment, animosity and a verbal warning. It is unreasonable to expect claimant to complain to the office manager because her repeated requests for a private meeting to discuss her concerns were rejected, the office manager responded to her request for a private meeting in part by asking "are you deciding that you do not want to work here," her attempts to discuss the matter during the March 2nd meeting were unsuccessful, and she was later issued a reprimand for making accusations against the coordinator and not communicating clearly enough. It is unreasonable to expect claimant to complain to the employer further because the office manager was the highest authority in the employer's business. Nor is it reasonable to expect claimant to file a wage and hour claim with the Oregon Bureau of Labor and Industries (BOLI) and continue to work under ongoing unlawful conditions while waiting for a resolution to her complaint.

At the time claimant decided to quit work she was experiencing ongoing and increasing symptoms of depression and was advised by her therapist to find a different job. Claimant reasonably concluded that her working conditions, including unlawful practices with respect to lunch breaks, were not going to change. No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working indefinitely under those conditions.¹ We therefore conclude that claimant's

¹ *Accord J. Clancy Bedspreads and Draperies v. Wheeler*, 152 Or App 646, 954 P2d 1265 (1998) (claimant had good cause to leave work when unlawful condition was ongoing); *compare Marian Estates v. Employment Department*, 158 Or App 630,

planned voluntary leaving was with good cause. Because we have determined that claimant's planned leaving was with good cause, ORS 657.176(8) does not apply. We must, therefore, adjudicate claimant's actual work separation, which occurred on June 8, 2016 when the employer discharged her in advance of her planned quit date.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest.

On June 8, 2016, the employer's office manager told claimant that she was not allowed to work through her notice period and was to leave immediately, thereby discharging claimant from her employment. The office manager did not provide claimant with a reason, and, as the employer did not appear at the hearing, the record fails to show any reason for the discharge. In the absence of evidence about the reason for claimant's discharge, we cannot find that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 16-UI-67227 is set aside, as outlined above.²

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

DATE of Service: October 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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976 P2d 71 (1999) (where unlawful condition was resolved, and only the issue of back pay restitution continued to exist, claimant did not have good cause to quit work).

² 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.