

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1090

Reversed
No Disqualification

PROCEDURAL HISTORY: On August 10, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 133153). Claimant filed a timely request for hearing. On September 7, 2016, ALJ Triana conducted a hearing at which the employer did not appear, and on September 12, 2016 issued Hearing Decision 16-UI-67306, affirming the Department's decision. On September 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but failed to certify that he provided a copy of that 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 claimant did not explain why he was not able to present that information during the hearing. Claimant did not show that factors or circumstances beyond his reasonable control prevented him from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's written argument or the new information that it contained. EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Ocean Beauty Seafoods, LLC employed claimant as operations supervisor and fleet supervisor from July 29, 2002 until June 10, 2016.

(2) Several years before 2015, claimant was diagnosed anxiety. Claimant was prescribed medicine to control his anxiety symptoms.

(3) The general manager had supervisory authority over claimant and all other staff at the employer's Portland office. Beginning sometime in or before 2015, claimant, other supervisors and many subordinate employees had difficulties working with the general manager of the Portland office. Several of claimant's subordinates had one-to-one meetings with claimant in which they complained about the general manager's abusive behavior. Audio at ~28:56. At supervisory meetings that claimant attended the general manager would yell and threaten the supervisors' jobs. Claimant sent a letter to the employer's president and the employer's chief financial officer to inform them of the way in which the

general manager treated supervisors in the Portland office and their subordinate employees. The general manager's behavior became so widespread and prevalent that claimant felt "terrorized" and like a "nervous wreck." Audio at ~15:05, ~22:46.

(4) In July 2015, claimant sustained an on-the-job injury. Based on prior experiences with the general manager, claimant thought the general manager would not want him to file a worker's compensation claim because of its financial impacts. After claimant was injured, the general manager suggested that he forego filing a worker's compensation and claim and seek reimbursement for his medical expenses through his private health insurance. Claimant asked the human resources department about the general manager's suggestion and was told he could not use his private insurance to cover the injury and he had to use the worker's compensation program as the exclusive source for reimbursement. Later, claimant filed a worker's compensation claim. Shortly thereafter, the general manager spoke to claimant and demanded to know why had filed the worker's compensation claim rather than using his private insurance for reimbursement. Afterward, claimant spoke with the employer's human resources department about reprisals by the general manager because he had filed the worker's compensation claim. Claimant noticed that his relationship with the general manager deteriorated after he filed the worker's compensation claim. Claimant thought the general manager would discharge him or arrange some way for force him to quit as a consequence of his worker's compensation claim.

(5) After July 2015, the general manager continued to mistreat employees. As one example, if the general manager decided he did not like particular employees, he would refuse to allow them access to the office to turn in their paperwork. After October 2015 and continuing into 2016, claimant became aware that many of his subordinate employees as well as other employees had filed human resources complaints in 2015 and 2016 against the general manager based on his treatment of them. Claimant also knew that many employees were considering filing a civil lawsuit against the employer based on the general manager's abusive behavior. Claimant told the employer's human resources department about the possible lawsuit, hoping that it would prompt human resources to look into the general manager's behavior.

(6) After October 15, 2015, claimant began to experience sleepless nights as a result of the general manager's behavior. Claimant continued to feel "terrorized" by the general manager. Audio at ~ 15:05. Claimant needed to increase the amount of anti-anxiety medication he was taking to control his anxiety at work. Sometime around this time, a supervisor told claimant he had not been given a promotion because he was "too old." Audio at ~33:42. Claimant thought he was being subjected to ageism and sent written notification to the human resources department.

(7) Claimant remained concerned that the general manager was taking steps to force him out of his job. Sometime before November 4, 2015, the general manager started assigning claimant often to drive a truck on a route rather than to stay in the office as was generally expected of the fleet supervisor. On November 4, 2015, claimant sent an email to the human resources department setting out his concerns that the general manager was trying to pressure him to quit work. In response, the human resources representative asked claimant if the general manager had ever told him why he was driving so much more at work. Claimant told the representative that the general manager had not told claimant anything. The human resources office took no action in response to claimant's concerns.

(8) On June 6, 2016, claimant was going to drive one of the trucks on its route because the fleet was short-handed on drivers that day. As claimant was loading his truck, the general manager walked up and yelled at claimant that he did not need to drive that day. The general manager was very angry and, when he was speaking to claimant, he gesticulated wildly with his hands. When claimant asked for more information about why he would not be driving that day, the general manager told him that he was relieving him of his job duties because he had been late reporting for work. When claimant tried to explain the reasons for his lateness, the general manager cut him off and told him to go home for the day. Claimant left and went home. Claimant called the human resources department and told a representative about the general manager's behavior that day. The human resources representative arranged a meeting with claimant on June 10, 2016.

(9) On June 10, 2016, claimant and the human resources representative met. Claimant explained to the representative that the general manager's cumulative behavior over the past had taken a toll on him and that he was "absolutely destroyed mentally" and could not continue to work under the general manager. Audio at ~15:51. The representative and claimant then began to discuss the terms of a severance agreement that would be acceptable to claimant. The representative wanted claimant to waive his right to file suit against the employer or the general manager based on the general manager's conduct. Claimant agreed to release all of his claims against the general manager or the employer.

(10) On June 10, 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 he proves, by a preponderance of the evidence, that he had good cause for leaving work when 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 P2d 722 (2010). Claimant had anxiety, 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 his employer for an additional period of time.

In Hearing Decision 16-UI-67306, the ALJ concluded that claimant was disqualified from receiving benefits because he failed to show good cause for leaving work when he did. The ALJ reasoned that claimant's interaction with the general manager on June 6, 2016 should be viewed in isolation, rather than as the culmination of a sequence of behaviors and determined that, although the general manager yelled at claimant, that interaction, viewed alone, did not rise "to the level of harassment, nor did it create a grave situation" for a person with an anxiety condition. Hearing Decision 16-UI-67306 at 3. Alternatively, the ALJ also reasoned that claimant did not pursue all reasonable alternatives before he left work, since when he met with the human resources representative on June 10, 2016, "claimant quit work rather than allowing the HR representative to fully investigate the situation and come up with a proposed solution." Hearing Decision 16-UI-67306 at 3. We disagree.

Since the employer did not appear at the hearing, the record consists only of testimony and evidence that claimant offered. No evidence controverted claimant's testimony about the behavior of the general manager leading up to June 6, 2016, that it was abusive and that several other employees had complained to the human resources department on many occasions about it and had threatened to file a civil lawsuit. While the ALJ focused only the general manager's behavior on June 6, 2016 to assess whether claimant had good cause to leave work, in the overall situation that claimant described it was appropriate to consider the general manager's behavior before June 6, 2016 as the context for claimant's reaction that day. No evidence disputed that claimant was impaired with anxiety. No evidence in the record directly disputed claimant's testimony that by June 6, 2016 he thought the general manager was trying to get rid of him, was mistreating him and other employees, that several other employees had filed human resources complaints against the general manager and that claimant was felt "terrorized," "abused" and like a "nervous wreck." Audio at ~13:04, ~15:05, ~15:50. It is not implausible that a claimant with an anxiety impairment and who was not sleeping would have perceived the general manager's behavior on June 6, 2016 as attempting to oust him from employment by sending him home for being late that morning. It also is not implausible that a reasonable and prudent person with an anxiety impairment would have considered this perceived threat as a grave situation. The ALJ erred in her conclusion that no reasonable and prudent person with anxiety would have perceived his situation on June 6, 2016 as being grave.

We also disagree with the ALJ's conclusion that claimant failed to pursue all reasonable alternatives prior to quitting because he failed to allow representatives from the human resources department to intervene in the situation. Hearing Decision 16-UI-67306 at 3. Prior to June 10, 2016, claimant had contacted the human resources department or the employer's upper management at least four times about the general manager's behavior. There is no evidence in the record that anything was done in response to these contacts or that an investigation was undertaken, even though many employees had filed complaints with the human resources department and claimant had advised the employer that some employees were going to file a civil suit based on the general manager's ill-treatment of them. Against this backdrop, when claimant brought up again to a human resources representative on June 10, 2016 the impacts on his emotional state of the general manager's treatment of him, and the representative failed to suggest any alternatives other than the preparation of a severance agreement for claimant, a claimant with an anxiety impairment would reasonably have concluded the human resources department was not going to intervene on his behalf and "come up with a proposed situation," as the ALJ speculated. Hearing Decision 16-UI-67306 at 3. The reasonableness of this conclusion is strengthened when the severance agreement as proposed would require claimant to waive all of his claims based on the general manager's behavior and there is no evidence in the record that the human resources department or any member of the employer's management ever took seriously any of claimant's reports about the general manager's conduct in the workplace. A reasonable and prudent person with an anxiety disorder like claimant's would reasonably conclude on these facts on June 10, 2016 that it was likely futile to expect that any action would be taken on his behalf by the human resources department or any other employer representative in response to his reports about the general manager, and conclude that the working conditions that were causing his concerns were unlikely to change. While claimant reasonably perceived he faced a grave situation on June 10, 2016, the evidence in the record is insufficient to support that there were reasonable alternatives other than for claimant to leave work.

Claimant showed grave reasons motivated his decision to leave work on June 10, 2016 and there were no reasonable alternatives to that decision. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-67306 is set aside, as outlined above.

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

DATE of Service: October 20, 2016

NOTE: 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.

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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