

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1171

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 2, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work with good cause (decision # 124611). The employer filed a timely request for hearing. On October 10, 2016, ALJ Vincent conducted a hearing, and on October 12, 2016 issued Hearing Decision 16-UI-69109, reversing the Department's decision. On October 18, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she first objected to the ALJ's exclusion of Exhibit 2 from the hearing evidence. Claimants' Written Argument at 1. However, the statement that comprised Exhibit 2 was included in Exhibit 3, which the ALJ admitted into evidence. *See and compare* Exhibit 2 and Exhibit 3 at 4. The ALJ did not err in excluding Exhibit 2 since it was unduly repetitious of evidence already in the record.

In her written argument, claimant also contended that the manner in which the ALJ questioned her and the employer's witnesses during the hearing showed the ALJ's "clear bias" against her. Claimant's Written Argument at 1; *see also* Claimant's Written Argument at 2. EAB reviewed the hearing record in its entirety, however, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-0025(1) (August 1, 2004). The record fails to show that the ALJ erred in questioning the parties.

In the body of her written argument, claimant presented new information and also asked EAB to consider the statements of three witnesses, which accompanied the argument. Claimant stated she did not offer the statements into evidence during the hearing because "it was difficult to obtain them before the original hearing." Claimant's Written Argument at 2. OAR 471-041-0090 (October 29, 2006) allows EAB to consider information that was not presented during the hearing only if the party offering it shows it is relevant and material to EAB's determination and factors or circumstances beyond the party's reasonable control prevented the party from offering that information into evidence during the hearing. Since none of the statements that claimant sought to have EAB consider contained first-hand

information about the employer's operations manager or the administrative assistant's alleged harassment and abuse of claimant or any behaviors of either of that might be construed as harassing or abusive of other employees, they do not appear to be relevant and material to EAB's determination of whether claimant had good cause for leaving work. Additionally, claimant did not explain why it was beyond her reasonable control to have those witnesses available to testify during the hearing or specifically why she was able to obtain a statement from one of those witnesses to submit into evidence at the hearing, but was unable to obtain statements from the other two. *See and compare* Exhibit 3 at 4 and Claimant's Written Argument at 3. Nor did claimant show that it was beyond her reasonable control to present the new information contained in the body of her argument during the hearing. For these reasons, EAB did not consider the witnesses' statements or the new information that claimant sought to present by way of her written argument. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) TNT Fiscal Intermediary Services, Inc. employed claimant as a payroll enrollment specialist from November 17, 2014 until July 13, 2016.

(2) Claimant had Type I Diabetes and associated peripheral neuropathy. In late May 2015, claimant developed Charcot Foot syndrome, a diabetes-related condition, that caused the second metacarpal bones in all five toes of her right foot to break. Claimant was in a cast on her right foot for five months, until approximately late October 2015, and then she had to wear a walking boot on her right foot for three or four months, or until approximately January or February 2016. During the time she was using the walking boot and after, claimant had many physical therapy appointments, many tests to assess the nerve function in her right foot and many appointments with physicians. During this time and after, claimant's ability to walk was seriously compromised. Claimant used a mobility scooter at work to accomplish tasks that would otherwise have required her to travel by foot. Claimant needed to take significant time off from work to attend medical appointments related to her right foot and toes.

(3) Claimant spoke to her supervisor and obtained permission to leave work to attend all needed medical appointments. The supervisor never refused claimant's requests for time off to attend medical appointments. A "handful of times" or under "five times," when claimant asked for permission to take time away from work for medical needs, while allowing her to do so, claimant understood her supervisor to comment that she was "replaceable." Transcript at 7, 8, 9. Claimant thought her supervisor meant that he "could find someone else to do [her] job," but she did not consider her supervisor was issuing a threat or a warning to her. Transcript at 8, 18.

(4) On a few occasions during the period when claimant needed to attend medical appointments, she asked her supervisor and the employer's administrative assistant if the employer had a process for her to request leave under the Family Medical Leave Act (FMLA) so she could protect her job and, if so, what medical documentation she needed to support the request. Both of them told claimant that the employer did not provide leaves under FMLA, and she "didn't need to do anything like that." Transcript at 16. The employer did not have 50 employees and was not obligated to follow FMLA requirements, but it was obligated to follow the requirements of the Oregon Family Leave Act (OFLA). Transcript at 27. Claimant's supervisor was aware of her medical condition, did not question that her requests for time off for medical appointments were legitimate and did not think she needed to provide medical documentation to support them. Transcript at 20. The employer never indicated to claimant that her job was in jeopardy as a result of her medical condition or the time off she needed for treatment.

(5) On one occasion, claimant was assisting in the training of a newly hired employee. Claimant's supervisor sent a plan for training the new employee to claimant and the employee. Claimant responded to the plan and told her supervisor she did not think it was satisfactory. Claimant also told the supervisor that the new employee was "overwhelmed" and provided other information to him about the employee's reaction to the training. Transcript at 22, *see also* Transcript at 9, 10. The supervisor then spoke with the new employee, who contradicted what claimant had told him about how the new employee was feeling. The supervisor then met with claimant, told claimant that the new employee did not agree with how she had characterized the new employee's reaction to the training plan, stated that the training plan would remain in place and advised claimant that, since she was not a supervisor, she should not be advocating on behalf of what she perceived the new employee was feeling, but should direct the new employee to raise any complaints she had with the appropriate supervisor. Claimant understood the supervisor to call her a "liar." Transcript at 9.

(6) During the time when claimant was using the mobility scooter in the workplace, the employer's administrative assistant sometimes took new employees around the office to introduce them to the existing employees. Sometimes, when the administrative assistant was introducing claimant to newly hired employees, she referred to claimant as "scooter girl." Transcript at 14. She did not tell the administrative assistant she found the term offensive.

(7) When claimant was hired she was told she would receive a six month performance review and thereafter would receive yearly performance reviews. Claimant received a six month performance review and no reviews thereafter. After November 2015, claimant repeatedly asked her supervisor to schedule her yearly evaluation, but he did not do so. Sometime around approximately June 2016, claimant's supervisor told her she was not going to have a performance review. In the interim since claimant was hired, the employer had lost a contract that accounted for a large portion of its revenues and it was "in turmoil." Transcript at 23-24. The employer had postponed holding performance reviews for all of its employees, including claimant. *Id.*

(8) During claimant's employment, although she had the email address of the employer's owner, claimant never complained to the owner about her supervisor's treatment of her, the administrative assistant's treatment of her, her failure to receive a performance evaluation or the failure of the employer to accommodate her desire to obtain a protected leave based on her medical condition.

(9) On July 13, 2016, after her shift was over, claimant left a letter for her supervisor stating that she was leaving work immediately. In that resignation, claimant stated she was quitting because of management's "aggression" and "negative comments and attitudes" that had "escalated to attacks [on] my work product, personality and integrity." Exhibit 3 at 3.

CONCLUSIONS AND REASONS: 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 P3d 722 (2010). Claimant had Type I Diabetes and Charcot Foot syndrome, which are permanent or long-term “physical or mental impairments” as defined at 29 CFR §1630.2(h). A claimant with those impairments 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.

While claimant testified at hearing she was “harassed,” “verbally attacked” and “humiliated” in the workplace based on her medical condition to the extent that she was “bombarded by the hostility,” the ALJ was only able to elicit the specific examples set out in the findings of fact to support these contentions. Transcript at 4, 8, 14; *see also* Transcript at 8, 10, 13, 15. Although claimant’s supervisor denied ever having referred to her as “replaceable,” that he might have made this comment to her on a few occasions during her employment is assumed for purposes of this discussion. That comment was not accompanied by refusing any of her requests for the time off she needed for medical reasons, not followed by any actions that would have suggested she was going to be discharged or disciplined for taking that time away from work and claimant testified she did not construe the “replaceable” comment as any type of warning or threat. Transcript at 7, 8, 18. Given that claimant was unable to provide any information about the context giving rise to the supervisor referring a “few times” or a “handful of times” to her as “replaceable” over the course of approximately 14 months, or even to state that there was no context for his comment, it is impossible to determine if he was exhibiting hostility toward claimant or if he was merely making a neutral statement in response to some topic other than her need to take time off for medical reasons. Transcript at 8, 9.

With respect to the employer telling claimant she did not need provide medical documentation to support her requests for time off due to her medical condition, and she did not need to seek a leave under FMLA or OFLA to protect her position, it is notable that claimant did not contend that the employer subsequently did anything other than to continue to allow her to take all the time off she needed for medical purposes. Claimant did not attempt to rebut the apparently sincere testimony of the employer’s witnesses that, while the employer was not covered by FMLA, it did not require her to apply for a protected leave, presumably under OFLA, because it was allowing her all of the benefits of a protected leave. Transcript at 20, 21, 27. On these facts, the employer was not harassing claimant or exhibiting hostility toward her based on her medical condition by not requiring her to seek a formal medical leave.

With respect to claimant’s contention that on one occasion her supervisor called her a “liar,” that he might have done so is assumed for purposes of this discussion even though the supervisor testified he never did. Transcript at 22. In the context in which he might have called claimant a “liar,” the supervisor was informing claimant that comments she had made about the feelings of the new employee were not what the employee had told him about her feelings, and he was rebuking claimant for undertaking advocacy on behalf of that employee when that was not part of her duties. That the supervisor might have strongly told claimant her understanding of what the new employee felt was a lie or she had lied, while not recommended terms to use, does not appear to constitute abuse or harassment in context and it was alleged to have occurred only once. We therefore conclude that using the term “liar” or “lie” was not hostile or abusive behavior on the supervisor’s part.

With respect to claimant’s failure to receive a performance evaluation after November 2015, claimant testified she did not know if any employees other than her had received their evaluations as scheduled.

Transcript at 11, 12. Claimant did not dispute the testimony of the employer's witness that financial difficulties and changes necessitated by those difficulties had cause the employer to suspend performance evaluations for all employees, including claimant. Transcript at 23, 24. On these facts, it does not appear that the employer's failure to perform a yearly performance review of claimant was motivated by hostility toward her, but was the result of neutral business considerations applied to all employees across the board. While claimant contended that she was "in limbo" because she had not received her yearly performance review, that statement is insufficient to show that the lack of a performance review constituted a grave circumstance for claimant.

With respect to the administrative assistant referring to claimant as "scooter girl," claimant did not allude to how often such a reference was allegedly made or describe any accompanying statements or body language on the part of the administrative assistant tending to show that her use of the term was hostile or abusive of claimant. Nor did claimant ask the administrative assistant to stop or complain about her use of the term to her supervisor, the owner or anyone else in authority in the employer's organization. Transcript at 14. Assuming the administrative assistant's calling her "scooter girl" on a few occasions created a grave circumstance for claimant, a reasonable and prudent person would have first complained to the administrative assistant or to someone in authority and determined that the assistant would not stop making offensive comments before concluding that she needed to leave work.

Claimant did not show that grave reasons caused her to leave work, or that she had good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-69109 is affirmed.

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

DATE of Service: November 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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