

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1213

Affirmed
No Disqualification

PROCEDURAL HISTORY: On September 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 160051). Claimant filed a timely request for hearing. On October 14, 2016, ALJ Seideman conducted a hearing, and on October 16, 2016 issued Hearing Decision 16-UI-69290, reversing the Department's decision. On October 28, 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 a copy of it was provided to the other parties as required by OAR 471-041-0080 (October 29, 2006). For this reason, EAB did not consider the employer's argument when reaching this decision.

EAB considered claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) PeaceHealth employed claimant as an environmental services attendant from September 21, 2015 until July 12, 2016.

(2) Claimant was born male and was living as man when the employer hired him. By early January 2016, claimant realized that his gender identity was female. Claimant determined that she would transition to living as a woman and her chosen name would be "Aimee." Claimant's realization had serious emotional effects on her.

(3) In late January, 2016, claimant began presenting an androgynous appearance at work in preparation for adopting a traditionally female appearance. At around this time, claimant informed her lead that she

was transgender and was going to transition to an openly female gender identification. The supervisor commented that he and some staff had deduced as much. The supervisor expressed his support of claimant's transition. On February 3, 2016, claimant met with her direct supervisor and another supervisor under whom she worked to discuss what they should expect during the transition and how claimant wanted to be treated during the transition and after. They discussed claimant's chosen name, her request that she be referred to by female pronouns such as "she" or "her" and how, over time, she would be presenting with an increasingly traditionally feminine appearance. Claimant described how she intended to effect the transition. Claimant mentioned that some coworkers and supervisors might have difficulty accepting her transition. Both supervisors expressed support for claimant.

(4) Shortly after claimant began openly transitioning, sometime around February 2016, claimant became overwrought at work due to the stress of the gender transition. Claimant asked her lead or her supervisor if she could leave work to collect herself. Claimant was told she "needed to use work to distract [herself]" from gender identification issues and she was not allowed to leave. Transcript at 7. As claimant's transition in appearance progressed, she encountered difficulties when she needed to change into sterile scrubs at work since she felt that it was no longer appropriate for her change in the male locker room. Claimant also encountered resistance and hostility from coworkers. Some female coworkers told claimant she was not really female, she was "just wearing a stuffed bra" and didn't "belong in the [female] locker room." Transcript at 10. Other coworkers made comments to claimant like, "So what, you're going to be a girl now. I just don't get it." Transcript at 12. In the workplace, claimant was very often referred to using male pronouns, despite her stated preferences. Claimant thought many of her coworkers refused to accept her new gender identity. Claimant spoke on several occasions to her supervisors about the resistance she was experiencing and the impacts it was having on her mental health. Sometime before March 9, 2016, claimant began wearing a wig to work and using a bandana as a headband. Although wearing a bandana in the manner that claimant did was not in violation of the employer's policies, claimant's supervisor, after complimenting her on her new wig, told her she was not permitted to wear bandanas. Claimant believed her supervisor was obstructing her in achieving a pleasing feminine appearance.

(5) On March 9, 2016, claimant met a second time with her two supervisors to clarify what her coworkers should expect during the transition, how she wanted to be treated during the transition and after and how she wanted to be addressed or referred to. The supervisors again told claimant she was not permitted to wear bandanas on her head. Claimant took the supervisor's correction as evidencing hostility toward her transition.

(6) After March 9, 2016, many of claimant's coworkers continued to use wrong gender pronouns in referring to claimant and made comments about claimant's transition that were offensive to her. The coworkers sometimes refused to complete their cleaning work, knowing that claimant's shift would follow theirs and claimant would be required to perform the clean-up that they had not done. The coworkers would not acknowledge claimant and avoided eye contact with her or they would glare at her without speaking and for no reason when she performed her work. The attitudes displayed by claimant's environmental services coworkers in the surgery unit and the intensive care unit were particularly hostile and claimant asked her supervisors not to assign her to work in either of those units. Claimant and one of her coworkers complained to claimant's supervisors about how she was being treated by the coworkers. By spring 2016, claimant was experiencing depression, anxiety and panic attacks at work, which she attributed to the response of her coworkers toward her transition. Claimant

went to a physician for treatment. The physician authorized an intermittent leave for claimant under the Family Medical Leave Act (FMLA), as needed, for her emotional symptoms. Claimant informed her supervisors of the symptoms and that she attributed them to the workplace atmosphere.

(7) Sometime around early May, one of claimant's coworkers from the intensive care unit was openly speculating in the workplace that claimant had hidden her true gender identity from the employer when she was interviewed in order to secure a job. That same coworker gossiped about claimant and made other derogatory comments about claimant and her gender identity to other coworkers. Claimant told one of her supervisors about the coworker's comments. The supervisor told claimant that the coworker had a "big mouth." Transcript at 19. The supervisor assured claimant that he would speak to the coworker's supervisor and he would deal with the issue of the coworker's comments.

(8) On May 13, 2016, claimant became aware that one of her coworkers had posted an unflattering comment on a social media website about a news article discussing transgender students' use of restroom accommodations corresponding to their gender identifies. In the comment, the coworker also attributed the winning sports records of certain female teams to the presence of transgender athletes on them. Claimant approached this coworker in a public area of the hospital to address the comments he had made and how they had offended her as a transgender female. The coworker told claimant that a combination of hormones and surgery was the only acceptable way to achieve a male to female transition. He commented, "If you have a dick, you're a man until you cut it off." Transcript at 25. Claimant realized he did not accept the legitimacy of her transition. The interaction between claimant and the coworker was later reported to members of the employer's management. As of this time, claimant's coworkers were still avoiding eye contact with claimant and, for no reason apparent to claimant other than her gender transition, still sometimes glaring at her. The coworkers continued using incorrect gender pronouns when referring to claimant and, by the persistence of the error, claimant thought they were doing it purposely.

(9) On May 27, 2016, claimant was asked to report for a meeting with a representative from the employer's human resources department. In reference to claimant's interaction with the coworker on May 13, 2016, the human resources representative told claimant that she needed to stop causing disruptions in the workplace. The representative advised claimant to avoid reacting to comments about her gender transition in the workplace, stating that she "need[ed] to have a work face and a home face." Transcript at 27. Claimant also understood from other comments the representative made that the representative thought claimant had brought the offensive behaviors from her coworkers on herself by deciding to effect a gender transition. Transcript at 28.

(10) On June 4, 2016, claimant had a serious panic attack at work. Claimant attributed the panic attack to apprehension about offensive behaviors that her coworkers might engage in that day and how she would respond. During the panic attack, claimant heard a coworker referring to her as "he" and identifying her by her birth name rather than her chosen name. Claimant's panic attack worsened. Claimant's coworker sent an email about this latest incident and other incidents to the human resources department on claimant's behalf. The coworker's email pointed out that such incidents were causing claimant to experience more anxiety and panic attacks. Exhibit 4. On June 7, 2016, the human resources department responded to the June 4, 2016 email, stating that it was unacceptable for it to discuss employees with other employees.

(11) Throughout June 2016, the behavior toward claimant in the workplace did not change. During this time, claimant was absent for several days under her intermittent FMLA leave for anxiety and depression. On July 1, 2016, claimant met again with representatives from the human resources department. Claimant explained in detail what she had been experiencing in the workplace since February 2016 and the impacts those incidents had on her emotional and mental health. Claimant asked representatives to take steps to ameliorate the situation, including disciplining certain employees. The representatives told claimant they would get back to her in two weeks with a timeline for sensitivity training for staff and the other steps that might be taken to rectify the situation. Sometime after, claimant sent an email to a human resources representative following up on the July 1, 2016 meeting and describing the seriousness of the symptoms she was experiencing due to the workplace environment. Exhibit 6. In response, a human resources asked claimant to compose a written outline of the incidents she had complained about at the meeting and a list of all the individuals involved. Exhibit 7. On July 9, 2016, claimant responded to the representative's email emphasizing the urgency she perceived in her situation and requesting immediate action. Exhibit 9.

(12) On July 12, 2106, claimant reported for work and saw that she was assigned to the surgery unit, where she had asked several times not be assigned due to the hostile behavior of staff in that unit toward her during her gender transition. Claimant spoke to her manager to attempt to obtain a change in the assignment. The manager and another manager were discussing where claimant might work that night when the other manager suggested an assignment for claimant that would have involved some work in surgery. Claimant's manager said, "*He* does not want to go to surgery." Transcript at 51 (emphasis added). When the manager used the male pronoun to misidentify claimant, claimant concluded that after over six months of transitioning, and the efforts she had made, she was still not accepted as a female and concluded she could not continue working in that workplace environment. Claimant cleaned out her locker and went home. Claimant voluntarily left work on July 12, 2016.

(13) Throughout the six months of claimant's gender transition, the only steps the employer took to address the numerous complaints claimant made was to provide training to supervisors in the environmental services department in the areas of discrimination and harassment in the workplace. The training did not involve claimant's coworker peers or address issues relating to transgender employees in the workplace or their particular needs. Transcript at 66.

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 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 anxiety and depression which, based on her description a hearing, appeared to be 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.

From claimant's description of the conditions she encountered in the workplace after she started her gender transition and its impacts on her mental state, her circumstances were most likely grave. While claimant made many efforts to alert her supervisors to the resistance and hostility she was encountering from some of her coworkers, the behaviors of those coworkers continued unabated. From the testimony at hearing from the employer's witness, the employer's efforts to rectify the offensive and seemingly abusive behavior of claimant's coworkers was limited to providing training for supervisors. Not only did this training not involve claimant's coworkers in the workplace who were subjecting her to their hostility on a day to day basis, but it also did not apparently address prejudices and biases commonly projected on transgender employees. After claimant endured this workplace behavior for over five months, had experienced anxiety, panic attacks and depression as a result of it, and any efforts the employer had taken with respect to training supervisors had proven ineffectual, it was reasonable for claimant to conclude that further efforts to resolve coworkers' hostile behavior toward her in the workplace would likely be futile. A reasonable and prudent employee with anxiety and depression and confronting the circumstances that claimant did would likely have concluded she could not tolerate those circumstances for an indefinite period of time hoping that her situation to improve, and left work when claimant did.

Claimant showed good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 16-UI-69290 is affirmed.

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

DATE of Service: December 1, 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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