

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1262

Reversed
No Disqualification

PROCEDURAL HISTORY: On September 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 64158). Claimant filed a timely request for hearing. On October 24, 2016, ALJ S. Lee conducted a hearing, and on October 28, 2016 issued Hearing Decision 16-UI-70218, affirming the Department's decision. On November 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument comprised of medical records that she did not offer into evidence during the hearing. Claimant failed to certify that she provided a copy of her 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 failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB did not consider claimant's argument. EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Harney District Hospital employed claimant as a cook from April 17, 1996 until August 2, 2016.

(2) Beginning in approximately 2013, the employer hired a new employee in the kitchen who became one of claimant's coworkers. Claimant and the new coworker in the kitchen did not get along. Claimant and the coworker had several workplace interactions in which claimant perceived the coworker to

“verbally attack” and “harass” and “bully” her. Transcript at 8. Claimant complained to her supervisor several times about the coworker’s behavior, but the supervisor did nothing. Claimant complained “multiple times” to the chief financial officer (CFO), who was the supervisor of her supervisor, about the coworker’s behavior and the failure of her supervisor to take steps to curb the coworker’s behavior. The CFO concluded claimant had “ongoing interpersonal relationship problems” with the coworker and a “relationship issue” with the supervisor. Transcript at 20, 21.

(3) In early May 2016, claimant visited her physician for help in dealing with her reactions to the coworker and her supervisor. The physician authorized a leave of two weeks for claimant to allow her to better deal with workplace stresses. After claimant returned to work from the leave, her reactions to the coworker and her supervisor had improved. Sometime later, the physician diagnosed claimant with depression and prescribed antidepressant medications.

(4) Sometime after May 2016, claimant had another very unpleasant interaction in the kitchen with her coworker and claimant began to cry. Claimant was upset and tearful and asked her supervisor if she could leave for the day. The supervisor refused to allow claimant to go, stating that it would cause too much “hardship” for claimant’s coworkers. Claimant stayed at work.

(5) Sometime in very late July 2016, the coworker yelled at claimant for putting a bucket that had contained bleach in a sink at claimant’s work station as claimant had been doing for the past ten years. When claimant protested that the sink in which the bucket was placed was at her work station, the coworker told claimant, “Why don’t you leave? Nobody likes you here anyway.” Transcript at 9. The argument continued until a nurse happened to walk into the kitchen. Claimant asked the nurse if the nurse liked her and the nurse stated she did.

(6) After the incident with the coworker over the bucket, the employer obtained statements from claimant and the coworker about their interaction over the bucket. When the employer tried to obtain a statement from the nurse, the nurse stated she witnessed nothing of the interaction between claimant and the coworker before claimant asked if she liked her. On approximately August 2, 2016, the CFO met with claimant to discuss the encounter with her coworker about the bucket. Claimant told the CFO that the coworker had “verbally attacked” her. Transcript at 17. Claimant was upset, “crying” and “very emotional” during the meeting. Transcript at 20. The CFO gave claimant a written warning and told claimant she was being placed on administrative leave until Tuesday, August 9, 2016. Claimant asked the CFO if she was going to be “fired” on Tuesday. Transcript at 19. The CFO told claimant she would meet with her on Tuesday after the employer had investigated the incident further and would notify her at that time if she was discharged. Unless the employer discovered new information about the incident than had already been provided by claimant, the coworker and the nurse, the employer would in all likelihood discharge claimant on Tuesday, August 9, 2016. Transcript at 23, 24, 25.

(7) After the meeting with the CFO concluded on August 2, 2016, claimant went home. Claimant decided that the employer was going to discharge her on August 9, 2016 and decided to leave work rather than “dwell on it [being discharged] for a week.” Transcript at 14. On August 2, 2016, claimant returned to the workplace and gave her supervisor a resignation letter. Claimant voluntarily left work on August 2, 2016.

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). If a claimant resigns from work to avoid what would otherwise be a discharge for misconduct or a potential discharge for misconduct that is not good cause to leave work. OAR 471-030-0038(5)(b)(F). The standard for showing good cause is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant appeared to have depression, which is 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.

In Hearing Decision 16-UI-70218, the ALJ found as fact that claimant resigned when she did on August 2, 2016 because she believed the employer was going to discharge her on Tuesday, August 9, 2016. Hearing Decision 16-UI-70218 at 3. The ALJ concluded that claimant did not show good cause for leaving work because “she had no way to know for sure” that the employer was going to discharge her on August 9, 2016 and she “could have met with the employer [on or before Tuesday August 9, 2016] and argued for her position if needed, even if it meant dealing with the stress of waiting on a decision. Hearing Decision 16-UI-70218 at 4. The ALJ further appeared to reason that claimant’s belief that the employer would accept the coworker’s account of what had happened during their interaction over the bucket was tantamount to an admission that she left work to avoid a possible discharge for misconduct, which the Employment Department rules specifically exclude from constituting good cause for leaving work. Hearing Decision 16-UI-70218 at 4. We disagree.

At the outset, the ALJ is correct that if claimant quit work solely to avoid being discharged for misconduct, then she could not show that she had good cause for resigning. See OAR 471-030-0038(5)(b)(F). However, that claimant resigned because she anticipated that the employer would not accept her account of the interaction with her coworker in late July 2016 and would discharge her, does not establish that she engaged in misconduct in that interaction, but only that she did not think the employer would believe her. OAR 471-030-0038(3)(a) (August 3, 2011) 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. The employer carries the burden to show claimant’s misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The account that claimant provided at hearing of her interaction with the coworker did not contain any facts showing that she violated the employer’s expectations willfully or with wanton negligence during that interaction. Transcript at 8, 9. Rather, claimant’s account was that the coworker “verbally attacked” her for placing a bucket in the sink as had been her habit for a long period of time. Transcript at 5, 8, 9. While the employer took statements from claimant and the coworker, the employer’s witness did not offer at hearing any information concerning what the coworker said about her interaction with claimant and why the employer issued a written warning to claimant based on it. Transcript at 17, 18.

As well, the employer's witness also testified that the nurse who intruded on the interaction had no information about it other than what claimant had asked her. Transcript at 19. On this record, the employer presented insufficient evidence to show that if it discharged claimant for her participation in the interaction with the coworker, that discharge would be for misconduct. As such, the ALJ erred in concluding that claimant resigned to avoid a discharge or a possible discharge for misconduct.

In *McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2010) the Supreme Court held a claimant who leaves work to avoid a discharge that is not for misconduct may show good cause for leaving work upon an appropriate facts, including that the discharge was likely imminent at the time at the time of the resignation and that a reasonable person would have considered the prospect of discharge so grave that quitting was the only reasonable option. While the ALJ is theoretically correct that claimant might have continued to argue her position that discharge was not an appropriate action for the employer to take, the ALJ appeared not to consider the testimony of the employer's witness during the hearing about the likelihood that the employer was going to discharge claimant on August 9, 2016. That witness testified that the employer had concluded that that claimant and the coworker had on "ongoing interpersonal relationship that [we] could never resolve and I think it wasn't going to get resolved," "I don't see how we would have changed anything," unless claimant was able to provide some sort of new information to the employer to consider, "we probably would have released her from her position on that following Tuesday [August 9, 2016]" and "there was a very strong possibility we were going to let her go." Transcript at 20, 23, 24, 25. Since claimant had already given the employer the explanation she had for the interaction with the coworker before she was placed on administrative leave on August 2, 2016, that claimant was going to be discharged on August 9, 2016 appears virtually certain on these facts. In addition, claimant's testimony about the depression she experienced as a result of stress in the workplace was un rebutted as was the serious distress she exhibited during the August 2, 2016 meeting, and it places in context why she likely decided to resign rather than continue to advocate her position until August 9, 2016. On these facts, a claimant who had depression, who had tried to state her position to the employer on August 2, 2016 but was rebuffed and placed on administrative leave, and whose discharge was highly likely on August 9, 2016, would have concluded she had no reasonable alternative other than to resign on August 2, 2016 and avoid further workplace stressors that would aggravate her depression.

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

DECISION: Hearing Decision 16-UI-70218 is set aside, as outlined above.

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

DATE of Service: December 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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