

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0106

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 145801). Claimant filed a timely request for hearing. On January 10, 2017, ALJ Murdock conducted a hearing at which the employer failed to appear, and on January 12, 2017 issued Hearing Decision 17-UI-74594, affirming the Department's decision. On January 30, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 17-UI-74594, the ALJ identified and admitted Exhibits 1 and 2, but marked all the documents as Exhibit 1. We have corrected the record by marking the doctor's statement as Exhibit 1, and the other statements as Exhibit 2, as stated in the record. Audio Record at 4:10 to 4:37. Claimant submitted a written argument to EAB, but 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). Therefore, we considered the entire record, but did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Green Transportation Co., LLC, a taxicab and shuttle service, employed claimant from June 9, 2008 until October 11, 2016 as an office manager.

(2) Claimant had medical conditions including migraine headaches, major depression and anxiety, and hypothyroidism. Work stress worsened claimant's medical conditions, including her depression and more migraine headaches. Exhibit 1.

(3) The employer's management consisted of the owner, the operations manager and claimant. The owner often yelled at claimant and treated her in a hostile manner, such as avoiding speaking to her directly even when claimant was present in the same room. The owner often called claimant in to work to address workplace problems, and did not pay her for the time. He offered to pay claimant to marry his brother, and when claimant refused, the owner's treatment of claimant worsened. The employer's drivers also routinely yelled at claimant and the female dispatch workers. Claimant and others complained about the drivers' mistreatment to the owner and the operations manager, but they did not

discipline the drivers or otherwise attempt to remedy the problem. Exhibit 2. Claimant sought medical treatment regularly for the stress caused by her workplace.

(4) During August and September 2016, the owner was negotiating the sale of the business. During that time, the owner discharged all the employees in the employer's billing and dispatch departments, with little or no notice, due to the impending sale. Claimant asked the owner whether she would continue to be employed once the owner sold the business, but the owner refused to answer claimant's question. The abrupt staff changes, perceived unfairness of how the owner treated the employees he discharged, and uncertainty about her own position caused claimant additional stress. However, claimant was hopeful her working conditions would improve once the ownership changed.

(5) On September 29, 2016, the operations manager told claimant that he knew, but was told by the owner not to tell claimant, that she would be discharged once the owner sold the company. Claimant and the operations manager did not know when a new owner would assume control of the business because the sale negotiations were ongoing. Claimant was willing to continue working for the employer, and believed the work environment would improve once the current owner sold the company and no longer worked for the employer.

(6) On September 30, 2016, claimant had to leave work during her shift because her daughter experienced a medical emergency and was being transported by ambulance from claimant's house to a hospital trauma unit. Claimant informed her coworkers of the situation. Claimant returned to work an hour later after the ambulance left for the hospital and explained to the owner that she would finish her Friday work assignments, then leave to go to the hospital. The owner was angry and yelled loudly at claimant, "I don't care what you do. You do my work. You get your stuff and go." Audio Record at 11:24 to 11:31. Claimant finished her shift and left work, uncertain if the owner had intended to discharge her. Claimant was upset by the owner's treatment of her and felt that she was at her "breaking point." Audio Record at 25:20 to 25:24.

(7) Claimant's schedule normally included working Mondays and Tuesdays. On Monday, October 2, 2016, claimant sent the employer an email notifying the employer that she had to miss work to care for her sick daughter. On October 3, 2016, claimant sent the employer an email that she was unable to work that day because she had a migraine. Claimant did not receive the normal confirmatory responses to her emails, so she sent the employer emails on October 4 and 5, 2016 asking the employer to "let [her] know what [her] position is with the company," so she knew "how to move forward," and stating that she wanted to address how the owner had treated her on September 30, 2016. Audio Record at 14:15 to 14:25.

(8) By Wednesday, October 5, 2016, claimant had received no communication from the employer since she left work on September 30. Claimant was unable to contact the employer by telephone because it had outsourced its dispatch system so that it received no direct calls and had no voicemail. She continued to try to call and email the employer. Some of the employer's drivers called claimant and told her she was no longer employed by the company and that the sale of the company had failed to happen.

(9) On October 5, 2016, claimant felt the stress from her situation was "unbearable." Audio Record at 16:57 to 16:59. Claimant sent the employer an email stating that she had not heard back from the

employer, did not know what happened or was going to happen with her job, and had decided to file an unemployment benefits claim.

(10) After October 5, 2016, claimant received a certified letter from the employer stating that she must return to work by October 10, 2016, and the employer would discuss her concerns about how the owner treated her. The letter did not state if the sale had occurred. Claimant did not return to work.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant left work with good cause.

In Hearing Decision 17-UI-74594, the ALJ concluded that claimant quit work without good cause reasoning that claimant's work situation was not grave and, without specifying what the alternative was, concluded that claimant had a reasonable alternative to quitting.¹ We agree the work separation was a quit, but conclude claimant had good cause to quit.

If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). Claimant testified that she was "confused" by the employer's failure to respond to her emails during the first week of October asking about her employment status, and did not know if the employer had discharged her. Audio Record at 27:04 to 27:09. Claimant was understandably confused by the employer's silence, especially after the owner's statements to her September 30. However, the employer's letter to claimant directing her to return to work on October 10 showed claimant could have continued to work for the employer for an additional period of time. Thus, claimant voluntarily quit work by deciding not to return to work at that time.

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 P2d 722 (2010). Claimant had migraine headaches, major depression and anxiety, and hypothyroidism, which were permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). Thus, the issue in this case is whether a reasonable and prudent person with the characteristics and qualities of an individual with claimant's impairments would have considered the situation so grave that she had no reasonable alternative but to voluntarily leave work when she did.

Claimant testified that she left work due to stress from the uncertainty about her future employment and the prospect of continuing to work for the current owner. Claimant's unrefuted testimony at hearing was that she repeatedly sought medical treatment for work stress because the owner yelled at her regularly, retaliated against her for refusing to marry his brother, and did nothing to resolve her complaints about

¹ Hearing Decision 17-UI-74594 at 3.

drivers mistreating her and other female employees. Claimant also testified that, on September 30, 2016, the owner yelled at her and told her to leave work when claimant missed work for one hour due to her daughter's medical emergency. The uncontroverted evidence in the record shows claimant's workplace was an oppressive situation characterized by hostility, yelling and retaliation that caused a grave situation for claimant. A claimant is not required to "sacrifice all other than economic objectives and *** endure *** personal abuse, for fear that abandoning an oppressive situation will disqualify the worker from unemployment benefits." *McPherson v. Employment Division*, 285 Or 541, 591 P2d 1381 (1979).

A claimant also is not required to pursue alternatives to quitting a job that are futile. *See, e.g., Early v. Employment Department*, 274 Or App 321, 328 (2015) (claimant was not obligated to request additional conflict resolution services before voluntarily leaving work when past use of conflict resolution services did not improve claimant's working conditions). Once claimant learned that the sale of the company and change in ownership would not occur, it was reasonable for claimant to conclude that, having already tried unsuccessfully to improve the workplace situation by complaining to operations manager and the owner about the drivers' behavior, and knowing she would continue to be subjected to the owner's mistreatment indefinitely, any further attempts to improve the workplace environment likely would be futile, and the workplace environment would not improve. Given the stress caused by the workplace and the uncertainty about her future with the employer, a reasonable and prudent person with depression and anxiety would have concluded that she had no reasonable alternative but to quit work to preserve her health.

Claimant met her burden to show good cause for leaving work when she did. She is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-74594 is set aside, as outlined above.

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

DATE of Service: February 21, 2017

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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