

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0134

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 6, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 135523). Claimant filed a timely request for hearing. On January 18, 2017, ALJ Seideman conducted a hearing, and on January 24, 2017 issued Hearing Decision 17-UI-75236, affirming the Department's decision. On February 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

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

FINDINGS OF FACT: (1) Optum Services, Inc. employed claimant as a report and referral consultant from August 1, 2016 until November 4, 2016.

(2) Claimant's nation of origin was Vietnam and Vietnamese was her first language. Claimant was sensitive to her difference in background from that of native-born Americans. Claimant sometimes did not understand American culture and behavior.

(3) In May 2015, claimant gave birth to her third child. The birth was traumatic, and claimant had an emergency cesarean section. Claimant sustained uterine and placental eruptions. Claimant's child had respiratory difficulties and was admitted to the neonatal intensive care unit. Sometime in early 2016, claimant was diagnosed with post-partum depression and anxiety and panic disorders, with many symptoms similar to those of post-traumatic stress disorder (PTSD). Claimant began to experience flashbacks of traumatic events to which she had been exposed in her life. Claimant sought mental health treatment was prescribed medication to treat her condition. Claimant began ongoing mental health

counseling. In 2016, claimant took a leave of absence from her then-employment as a result of her mental health conditions. Later in 2016, claimant resigned from that employment due to her perception that she had been discriminated against because of her national origin.

(4) On approximately August 3, 2016, claimant's second day of employment, claimant overheard one of her new coworkers commenting on a phone call the coworker had just ended with a client. The coworker mentioned that the client did not speak English well and commented that the client "probably eats rice every day." Transcript at 7. The other employees in the workplace started laughing as if it was a funny joke. Claimant was offended, and thought that the comments showed intolerance toward non-native English speaking people like her.

(5) Sometime later, while at work, claimant set her lunch bag on a table in preparation for eating and left it while she went to the bathroom. When she returned, the lunch bag was gone. When claimant was unable to locate it, one of her coworkers stated, "Who took the new girl's lunch? Is this an initiation?" Transcript at 6-7. Claimant thought someone had intentionally taken her lunch and that the employees in the lunch room were "mocking" her. Transcript at 6. Claimant's perception was reinforced when none of the other employees in the lunch room assisted her in trying to find the missing lunch bag.

(6) Sometime after, the person training claimant had lost her key card and asked claimant if she could borrow hers because she was going to leave the work area and would need one to re-enter. Before the trainer made the request, the trainer had asked claimant where she was from, and after claimant stated she was from Vietnam, the trainer then commented, "That's the country where we went to war with. Isn't that correct?" Transcript at 8. Claimant gave the trainer her key card. When the trainer returned, she told claimant that she had needed to swipe claimant's card several times before it would open the door to the work area. The trainer then told claimant "it's probably because they think [you're] a terrorist." Transcript at 8. Claimant interpreted the comment to mean that he trainer was calling her a terrorist. Transcript at 9, 17. The comment upset claimant because it evoked images for her of "9-11 [terrorist attack] and the Boston Marathon [bombing]." Transcript at 9. Claimant told her supervisor about the trainer's comment and the supervisor told claimant that the trainer's comment was probably a joke and the trainer did not mean anything by it. Claimant did not accept the supervisor's explanation.

(7) At some point during her employment, claimant asked her supervisor to communicate with her orally or by phone and not through emails, text messages or instant messages since she sometimes had difficulty comprehending written communications and responding in writing. Claimant's psychologist had recommended she make this request to ease the stress she experienced in the workplace. Despite her request, the supervisor continued to communicate with claimant in writing. Claimant concluded the supervisor was not willing to accommodate her.

(8) As time went on, claimant continued to interpret various workplace incidents as directed toward her and disparaging of her and her ethnicity. Claimant began experiencing depression, extreme anxiety and panic attacks in the workplace. Claimant experienced insomnia. Transcript at 14. Claimant had nightmares about people in the workplace taking actions against her or saying disparaging things about her. Transcript at 19. Claimant was unable to concentrate or function at work.

(9) Claimant discussed the incidents in the workplace and her reactions to them with her treating psychologist. The psychologist told claimant that the incidents she described were “triggers” for her and that, “because of [her] diagnosis,” the “best decision” was for claimant to leave work. Transcript at 15.

(10) Claimant did not tell her supervisor that she had mental health conditions because she was reluctant to raise them with the supervisor. Claimant did not raise her health issues or complain about the incidents in the workplace with the employer’s human resources department because she had done so before she left her former employment and “things just got worse and eventually I had to leave [that employment].” Transcript at 19. Transcript at 19.

(11) On November 4, 2016, claimant resigned because of the workplace behaviors she experienced during her employment and the impacts of those behaviors on her mental health.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that 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 depression and anxiety, 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 his employer for an additional period of time.

In Hearing Decision 17-UI-75326, the ALJ concluded claimant voluntarily left work without good cause. The ALJ reasoned that while claimant might have felt that “people kidded her because of her language” and might have felt discriminated against because she was of Vietnamese origin, she did not show that there were no alternatives to her leaving work when she did. Hearing Decision 17-UI-75326 at 3. The ALJ specifically noted that claimant could have raised her concerns with the employer’s management and the employer’s human resources department and could have “communicated better with her supervisor” or “could have tried to be more positive” in lieu of quitting when she did. Hearing Decision 17-UI-75326 at 3. We disagree.

At the outset, the ALJ erred in ignoring the impacts of claimant’s mental health impairments when reaching his decision and did not give proper weight to them in assessing whether she had good cause for leaving work when she did. It was undisputed at hearing that claimant experienced serious depression and anxiety. Claimant’s testimony at hearing appeared sincere about her impairments. We infer that those impairments could have caused claimant to misinterpret statements and incidents in the workplace as directed toward her and disparaging of her and her background when they might not necessarily have been so interpreted by a person without those impairments. Based on claimant’s impairments giving rise to these interpretations, she likely experienced the workplace environment as posing grave circumstances to her.

While claimant theoretically could have pursued the alternatives suggested in the ALJ's decision before quitting, it is significant that the psychologist treating claimant recommended that she quit work due to her impairments. There was no evidence in the record that the psychologist advised claimant to pursue at least some alternatives before quitting, or that the psychologist advised anything other than that claimant's impairments necessitated that she leave work immediately. That claimant did not approach the employer's management or its human resources department before quitting was also explained by claimant's testimony that she had done so before leaving her prior employment, those efforts were futile and she concluded such efforts would not yield a different result with the employer. With respect to approaching her immediate supervisor, management and the employer's human resources department about the workplace incidents, claimant alluded to her inability to disclose her mental health status to her supervisor and that her mental health conditions "just didn't allow me to [bring it up]." Transcript at 33. Based on the firm and unequivocal recommendation of claimant's psychologist that quitting was the "best decision," claimant's prior experience and the effects of her impairments on her ability to conceive of or pursue alternatives to leaving work, there is insufficient evidence in this record to conclude that speaking further with her supervisor or approaching management or the human resources department before quitting would have been, under the circumstances, reasonably available alternatives to a person with claimant's particular impairments.

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

DECISION: Hearing Decision 17-UI-75326 is set aside, as outlined above.

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

DATE of Service: March 2, 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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