

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0137

Reversed
No Disqualification

PROCEDURAL HISTORY: On November 18, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 133051). Claimant filed a timely request for hearing. On December 16, 2016 and January 9, 2017, ALJ Shoemake conducted a hearing, and on January 17, 2017, issued Hearing Decision 17-UI-74803, affirming the administrative decision. On February 3, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) From February 29, 2012 until October 13, 2016, Market of Choice employed claimant, last as kitchen manager.

(2) In approximately June of 2015, claimant began having problems in her relationship with the manager of the store where claimant worked. The store manager often yelled at claimant, at times in front of customers, and spoke harshly and critically to claimant about her performance. Claimant felt intimidated by the store manager's behavior

(3) In December 2015, claimant met with the store manager, a representative from the employer's human resources (HR) department and other managers for an evaluation of claimant's performance. The store manager talked in a loud voice, almost yelling, and leaned over claimant while he pointed at her. The store manager told claimant that "I've asked these women here today to be here because they're women and you're a woman. And they understand you." 12/16/16 Transcript at 36. The store manager criticized claimant's recent marriage, called her a "hummingbird," and said that "she was like the spin cycle on a washing machine." *Id.* The manager's remarks upset claimant, who began to cry. The employer's sales manager unsuccessfully attempted to direct the store manager to focus on claimant's work performance and not her personal life or personality.

(4) After the December meeting, the sales manager requested and the employer's HR department began an investigation into the store manager's behavior. When the store manager learned about the investigation, he called claimant into his office and questioned her about it. 1/9/17 Transcript at 26.

When the HR department completed its investigation, it reported that the store manager had taken “ownership” of his behavior and was working with the HR department. 12/16/16 Transcript at 38.

(5) On February 17, 2016, the store manager told claimant that she was using a great deal of her paid time off, and that if she exhausted her paid time off and needed to take time off, she would accrue “occurrences,” *i.e.*, unexcused absences. Exhibit 1, Notes of February 18 and 19, 2016 meetings. Claimant believed that the store manager was warning her that her job was in jeopardy, and complained to an HR representative. The HR representative met with claimant and the store manager, and the store manager apologized to claimant. The store manager explained that he had not meant to upset claimant, but only wanted to support claimant in her position and make sure that she not accrue occurrences.

(6) After the December 2015 meeting, the store manager continued to engage in behaviors that intimidated claimant. On one occasion, he yelled at claimant and asked her “why the hell is it [the chicken hut] empty?” On another occasion, claimant was returning from the restroom and the manager told her, in front of customers, to “get your ass back in the department right now. I don’t care why you had to leave.” 12/16/16 Transcript at 19-20.

(7) On March 31, 2016, the store manager gave claimant a written warning about her failure to adequately monitor her kitchen and staff. On August 4, 2016, the store manager gave claimant another written warning about her failure to implement improvements she had been directed to make in March.

(8) From April through the end of September 2016, the store manager and other managers held a number of meetings to discuss claimant’s performance. At these meetings, the store manager behaved aggressively and rudely; he often spoke to claimant in a loud, angry voice, did not allow claimant to speak, and attacked “her person instead of talking about anything that – performance wise that needed to be improved.” 12/16/16 Transcript at 39.

(9) Claimant had a “long term history of migraines” for which she has received treatment. Beginning in December 2015, her migraines became more frequent. Exhibit 3. Claimant also began having anxiety attacks, during which she felt nauseous and had difficulty breathing, approximately three times a week due to the stress she was experiencing at work. 12/16/16 Transcript at 28. In approximately July 2016, claimant’s health care provider told her she needed to find a new job because of the adverse effect the stress was having on her health. 12/16/16 Transcript at 30.

(10) On September 29, 2016 claimant notified the employer’s HR representative, the sales manager and the store manager that she was quitting her job, effective October 13, 2016. After discussions with her managers, claimant agreed to stay. On October 3, 2016, however, she informed the managers that she would be leaving work on October 13.

CONCLUSION 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's migraine headaches constituted 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.

The record shows that claimant faced a grave situation at work due to the aggressive, intimidating and inappropriate behavior of her supervisor, the store manager. Claimant's testimony about the store manager's behavior was corroborated by the employer's sales manager, who was present at meetings held to discuss claimant's performance. As a result of the stress claimant experienced at work, which caused her to have anxiety attacks and more frequent migraines, claimant's health care provider recommended she find another job.

In Hearing Decision 17-UI-74803, the ALJ also found that claimant faced a grave situation, but concluded that she failed to show her that her situation "was so grave that it left her no reasonable alternatives but to quit work." Hearing Decision 17-UI-74803 at 3. According to the ALJ, claimant had the reasonable alternative of continuing to work for the employer, as the employer wanted her to do, while the employer's human resources department investigated claimant's allegations concerning her supervisor, as the human resources representative told claimant it was willing to do. We disagree. A December 2015 investigation into allegations that claimant's supervisor behaved rudely and aggressively toward claimant did not result in changes in the supervisor's behavior sufficient to improve claimant's workplace situation. Based on this record, we conclude that allowing HR to further investigate the supervisor's behavior would have been futile.¹

A reasonable and prudent person, who suffered from migraines, who worked with a supervisor who created a workplace so stressful that it significantly and adversely affected her health, and who had been unable to resolve her problems after the employer's human resources department investigated the supervisor, would conclude she had no alternative but to voluntarily leave work.

Claimant voluntarily left work with good cause. She is not disqualified from the receipt of unemployment benefits on the basis of this work separation.

DECISION: Hearing Decision 17-UI-74803 is set aside, as outlined above.

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

DATE of Service: February 24, 2017

¹ See *Early v. Employment Department*, 247 Or App 321, 360 P3d 325 (2015) (claimant demonstrated good cause for quitting due to workplace problems when employer failed to offer her alternatives after she announced she was leaving; the court held that the employer's failure to offer alternatives "implicitly suggested there were none" and that any further attempts to resolve the problems would have been futile.).

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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