

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0512

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 1, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with the employer without good cause (decision # 70944). Claimant filed a timely request for hearing. On April 12, 2017, ALJ Janzen conducted a hearing, and on April 13, 2017 issued Hearing Decision 17-UI-80939, affirming the Department's decision. On May 2, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument, but only to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) El Azteca LLC employed claimant from January 1, 2016 to February 1, 2017.

(2) Claimant started working for the employer as a server. In mid-2016, however, the employer assigned claimant additional duties, including closing duties when the employer's head manager and floor manager were not present, and gave claimant a \$1 per hour raise. Although the employer did not consider claimant a manager, claimant and other employees considered claimant a manager in charge when the head and floor managers were not present.

(3) In December 2016, the employer deducted wages from claimant's paycheck because her register was short \$60 on November 30, 2016. Claimant complained to the floor manager that the deduction was unlawful, but the floor manager ignored her complaint. Later that month, the employer deducted wages from claimant's paycheck because it held her responsible for a customer leaving without paying his bill on December 16, 2016. Claimant again complained to the floor manager that the deductions were unlawful, and showed him online that they were unlawful. The employer reimbursed claimant for the deductions, but on December 20, 2016 gave her written reprimands for her November 30 register shortage and the incident involving the customer leaving without paying.

(4) One of the employer's servers, RQB, had a history of becoming "disgruntled" with other employees. Transcript at 31. In January 22, 2017, the head manager and floor manager traveled to Belize, intending to return on January 29, 2017. Shortly before leaving, they advised employees that if RQB became disgruntled with other employees while the managers were gone, to relieve her of her shifts until the managers returned. Transcript at 31.

(5) The floor manager's mother, SG, worked for the employer as a server. On January 23, 2017, while the managers were in Belize, SG complained to claimant about RQB, and told claimant to suspend RQB until the managers returned. Claimant offered to talk to RQB to try to resolve the issue, but SG rejected that idea. Claimant then instructed SG to contact the floor manager to make sure he wanted claimant to suspend RQB.

(6) On January 24, 2017, claimant asked SG if she had talked to the floor manager. SG told claimant she had not. Claimant again offered to try to resolve the issue, but SG insisted that claimant do her "F-ing job" and suspend RQB until the managers returned. Transcript at 6. Given the managers' instructions before leaving for Belize, claimant believed she was obligated to suspend RQB until the managers returned. Claimant therefore did so. After RQB left work, SG commented, "One down, you're either with me or against me." Transcript at 11. On January 25, 2017, claimant gave RQB an "informal" written notice of the suspension, in which claimant expressed her disagreement with the suspension, but stated she believed she had no other option but to follow orders given, in fear of being held accountable as a manager. Exhibit 1 at 10.

(7) Also on January 25, 2017, SG proceeded to "nitpick" another server to such an extent that the server wrote a letter to the floor manager stating that she would no longer work with SG, and advised claimant that she would not return to work until the managers returned from Belize, leaving the employer further understaffed. Transcript at 11-12.

(8) The following night, January 26, 2017, claimant and another server, SC, were on duty, with SC tending bar. SG was off duty but lived in an apartment above the employer's restaurant, came down and sat at the bar, and proceeded to become intoxicated and "really mouthy." Transcript at 22. As claimant and SC were preparing to close, SG asked claimant, while two customers were sitting at the bar and another two at a nearby table, if claimant could "get her some methamphetamine." Transcript at 22. Claimant refused to do so, and reminded SG that the employer's security camera was recording her. SG replied, "Really, what is he going to do?", and asked SC if she knew where SG could "get any meth." Transcript at 22-23. SG asserted that the managers had left her approximately \$15,000 "for lottery," and stated to the people present, "If you can get me meth I'll give you the money for it. If you bring it to my room upstairs, I'll give you a hundred dollars for doing it." Transcript at 23. Claimant and SC finished closing as quickly as possible and left work.

(9) On January 27, 2017, SG was not on duty, but walked around the restaurant "nitpicking" at the employees on duty, and acting as if she were in charge of them. Transcript at 23. On January 28, 2017, SG continued such behavior toward claimant to such an extent that claimant informed SG that she was leaving. As claimant left, SG yelled and screamed at her and about her to another employee, asserting that claimant had "F-ing" quit. Transcript at 24. When claimant got home, she sent the managers a text message complaining about SG's behavior over the previous six days. The head manager replied, asking claimant to "try to make it through" until the managers returned. Transcript at 10. Claimant

replied that the only way she would return to work was if SG was required to remain upstairs in her apartment and out of the restaurant. Two hours later, the head manager replied, instructing claimant to take the rest of the day off. Four hours later, the floor manager sent claimant a text message stating that under no circumstances was claimant to return to the restaurant, that a full investigation of claimant's complaint would be taken, and that the managers would contact claimant when they returned.

(10) On January 29, 2017, the managers returned from Belize. On January 30, 2017, claimant sent the managers a text message informing them that she had suspended RQB, as she believed she had been obligated to do, and had given RQB written notice of the suspension. The managers replied that they had not left claimant in charge as a manager while they were gone, and that claimant had no authority suspend RQB. Claimant believed the managers intended to use her suspension of RQB as an excuse to discipline claimant.

(11) The managers considered claimant's complaint against SG merely the result of "a little bit of a power struggle" between the two while the managers were gone. Transcript at 30. After investigating the complaint, the managers decided to suspend claimant and SG for one week. The managers also advised SG that if she came to work "under the influence" she would be drug tested, and that she would be discharged if she failed the test. Transcript at 32. The managers scheduled claimant and SG to return to work on February 5, 2017 and intended to meet with claimant, give her formal written notice of her suspension, and discuss her concerns about SG's behavior.

(12) On February 1, 2017, claimant notified the employer she was quitting work, effective immediately. In early February 2017, SC also quit work due to SG's behavior.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant voluntarily left work with the employer 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). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In Hearing Decision 17-UI-80939, the ALJ found that claimant and SG "had several conflicts" caused by SG's "belligerent behavior" from January 23 through 28, 2017, and quit work because of their "ongoing dispute."¹ However, the ALJ summarily concluded that SG's behavior did not create a grave situation for claimant, and further concluded that claimant "did not explore" her reasonable alternatives to quitting such as waiting for the managers to complete their investigation and meeting with them in person to discuss "the issue" further.²

¹ Hearing Decision 17-UI-80939 at 1-2.

² *Id.* at 2.

We first disagree with the ALJ's conclusion that SG's behavior from January 23 through 28, 2017 did not create a grave situation for claimant. As found by the ALJ, SG's behavior on January 23 and 24, 2017 resulted in the suspension of a server, RQB.³ Omitted from the ALJ's findings, however, is that on January 25, 2017, SG harassed another server to such an extent that the server left work, refused to work with SG in the future, and refused to return to work until the managers returned, leaving the employer further understaffed. Also omitted from the ALJ's findings is that on January 26, 2017, SG asked claimant, another server and several customers to obtain methamphetamine for her, for which she offered to pay with the employer's lottery money. Also omitted from the ALJ's findings is that on January 27 and 28, SG continued to harass claimant and other employees to such an extent that claimant felt compelled to leave work and return only if SG was required to remain upstairs in her apartment and out of the restaurant. SG's behavior, especially that of asking claimant, another employee and customers to engage in unlawful behavior on her behalf, was more than sufficient to create a grave situation for any reasonable and prudent person of normal sensitivity, exercising ordinary common sense.

We also disagree with the ALJ's conclusion that waiting for the managers to complete their investigation and meet with them in person to discuss the issue further were reasonable alternatives to quitting. The ALJ found that when, on January 28, 2017, claimant complained to the managers about SG's behavior and asked them to rectify the situation, the managers told claimant to "take the day off" to get away from SG, and that they would investigate the issue and contact claimant to resolve the complaint.⁴ Omitted from the ALJ's findings, however, is that the managers then suspended claimant until they returned from Belize, held her responsible for the suspension of RQB, considered her complaint against SG merely the result of "a little bit of a power struggle," and, after completing their investigation, decided to suspend claimant for one week with the intent of returning her to work with SG at a later date. No reasonable and prudent person would continue to work for an employer that responded in such a disciplinary, critical, dismissive and unfair manner to the person's complaint about SG's behavior, especially that of asking claimant, another employee and customers to engage in unlawful behavior on her behalf, purchasing methamphetamine with the employer's lottery money. When claimant quit work, the managers already had completed their investigation and made their decision to unfairly discipline claimant to the same extent as SG, and meeting with them to discuss the situation therefore would have been futile. Claimant therefore had no reasonable alternative but to quit.

Claimant quit work with good cause. She is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 17-UI-80939 is set aside, as outlined above.⁵

J. S. Cromwell and D. P. Hettle;

³ *Id.* at 1.

⁴ *Id.* at 2.

⁵ 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.

Susan Rossiter, not participating.

DATE of Service: June 6, 2017

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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