

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0662

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100053). Claimant filed a timely request for hearing. On May 19, 2017, ALJ SgROI conducted a hearing, and on May 23, 2017 issued Hearing Decision 17-UI-84021, affirming the Department's decision. On May 31, 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 (1) In November 2005, claimant began working as a dental hygienist for a doctor who owned a dental practice. In January 2012, Lisa Gitelson, DMD, PC, hereinafter referred to as "the employer," purchased the business. From January 2012 to March 13, 2017, the employer employed claimant as a dental hygienist. The employer also hired the doctor who had previously owned the business to work as an associate.

(2) Claimant had a variety of concerns about the doctor who had previously owned the business. The doctor and an assistant were engaged in an extramarital affair with one another; the affair was common knowledge among staff and affected the operations of the workplace. The doctor had yelled at claimant, said she was a liar, said she was deceitful, and accused her of acting like a 17-year old. On other occasions, the doctor falsely accused claimant of improper timekeeping, accused her of not attending to her patients, and told other employees that "she should be fired." Audio recording at ~ 11:30, 11:50, 12:20. The assistant also reported anything negative she observed to the employer, as though attempting

¹ We note that the employer opted not to attend the May 19, 2017 hearing and did not offer any evidence into the hearing record. Because claimant's testimony was sincere, plausible, credible, and was not refuted by other evidence in this record, all findings of fact in this decision were based upon claimant's testimony.

to influence the employer to fire claimant. As a result, claimant felt “somewhat fearful” of the doctor and what he or the assistant would do or say if she confronted them. Audio recording at ~ 19:50.

(3) Claimant had worked for the business for an extended period and understood based on her relationships and communications with its small staff that many of them had concerns about their working environment based on the doctor’s and assistant’s behavior toward them. Claimant understood that five employees had quit or been discharged by the employer for reasons related to the doctor and the assistant’s affair and their behavior in the workplace, including one she understood had been discharged for confronting the assistant. Because the doctor had yelled at her and made unfounded accusations about her work performance and truthfulness, and based on her knowledge of why others had left or been discharged from their employment, claimant felt fearful that she might lose her job if she confronted the doctor or the assistant about their behavior, and chose not to do so.

(4) Since 2012, claimant had complained “on many occasions” to both the employer and the office manager about the doctor’s behavior toward her and how it affected her and the workplace. Audio recording at ~ 10:10, ~ 17:00, ~ 18:30. She asked that the owner hold the doctor accountable for his behavior. Claimant felt increasing hostility in the workplace as time passed, and experienced growing anxiety severe enough that she considered seeking medical attention for it. She also thought about quitting her job, but she liked her patients and wanted to retire from her job with the employer so she continued to work and hoped that the employer would address her concerns. The working conditions did not change despite claimant’s complaints.

(5) By approximately February 28, 2017, claimant concluded that the employer was not going to address the concerns she had been expressing for years, and that the situation would only grow worse if she stayed. At the time she gave notice, claimant again voiced her concerns to the employer and office manager and told them how the working conditions were affecting her, but received no response.

(6) On approximately February 28, 2017, claimant notified the employer that she would quit in two weeks. At that time and when she quit work, effective March 13, 2017, claimant again complained to the employer and the office manager about the hostility she experienced in the workplace and the effect it was having on her. Neither the employer nor the office manager addressed her concerns.

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). 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.

The ALJ concluded that claimant quit work without good cause because her situation was not grave and because claimant “testified at hearing that she did not make a genuine effort to seek other work prior to resigning” and did not speak to the former owner of the employer’s business about her concerns before quitting. Hearing Decision 17-UI-84021 at 2. We disagree.

The Court of Appeals has repeatedly held that continuing to work while seeking other work is not a reasonable alternative to quitting work. See *Campbell v. Employment Dep’t.*, 256 Or. App. 682, 303 P.3d 957 (2013); *Strutz v. Employment Dep’t.*, 247 Or. App. 439, 270 P.3d 357 (2011); *Campbell v. Employment Dep’t.*, 245 Or. App. 573, 263 P.3d 1122 (2011); *Warkentin v. Employment Dep’t.*, 245 Or. App. 128, 261 P.3d 72 (2011); *Hill v. Employment Dep’t.*, 238 Or. App. 330, 243 P.3d 78 (2010). Not only is it true in every case that an individual could have kept working, as the availability of continued work is the hallmark of a “voluntary leaving,” it is beside the point because it does not answer the question of whether a reasonable and prudent person would quit under the conditions at issue. See *accord Warkentin v. Employment Dep’t.*, 245 Or. App. 128, 261 P.3d 72 (2011). It is therefore immaterial to this case that claimant “did not make a genuine effort to seek other work” before she quit.

It is also not determinative of the outcome of this case that claimant did not speak with the doctor about her concerns before quitting. Not only was the doctor no longer in charge of the employer’s business, he had responded to her previous complaint by yelling at her, and had accused her of deceit and made unfounded accusations about her timekeeping and treatment of patients. He stated to other employees that “she should be fired,” and the assistant with whom he had a personal relationship had also engaged in behavior that suggested to claimant that they were trying to influence the owner to discharge her. No reasonable and prudent person subjected to that sort of behavior would consider complaining to the doctor as a “reasonable” alternative to quitting work; rather, she would consider such a complaint to be an exercise in futility that was unlikely to change the working conditions. Confronting the doctor about his behavior was, therefore, also not a reasonable alternative to quitting work.

In sum, over a period of years claimant had experienced unfounded accusations and ongoing ill treatment by coworkers, experienced growing anxiety and worsening working conditions, had repeatedly complained about the situation to the employer and the office manager. Despite claimant giving notice of her intent to quit work because of those coworkers and the effect they had on claimant, the employer and office manager did not undertake any action that improved claimant’s working conditions. Claimant’s situation was grave, and there were no reasonable alternatives for her to explore that she had not already considered and either tried or determined would be futile. Under the circumstances, no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have continued to work for the employer for an additional period of time. Claimant therefore quit work with good cause, and she is not disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Hearing Decision 17-UI-84021 is set aside, as outlined above.²

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

² 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.

DATE of Service: June 21, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.