

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0667

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82945). Claimant filed a timely request for hearing. On May 24, 2017, ALJ Amesbury conducted a hearing, and on May 25, 2017 issued Hearing Decision 17-UI-84294, affirming the Department's decision. On May 31, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not part of the hearing record, and did not show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. As a result EAB did not consider that new information, but considered only information received into evidence at the hearing when reaching this decision. *See* OAR 471-041-0090 (October 29, 2006)

FINDINGS OF FACT: (1) Northwest Regional Education Service employed claimant as an instructional assistant from December 5, 2016 until April 3, 2017. Claimant provided in-classroom support and assistance to a teacher of special needs students. The teacher whom claimant assisted had no previous classroom experience with special needs students.

(2) During her employment, claimant became dissatisfied with the ways in which the teacher she was assigned to assist supervised the students in the class. The teacher sometimes grabbed students when directing them to a different activity and sometimes tossed toys in their direction. On occasion, the teacher interacted with students while holding a cup of hot coffee. A few times, when claimant was interacting with a student, the teacher abruptly dropped a puzzle or a book on a table in front of claimant and told claimant to do something else. When the teacher returned to the classroom after taking a break, claimant sometimes smelled cigarette smoke on the teacher's clothes or her person. Claimant brought up her concerns about the teacher's behavior toward students with the principal. The principal attributed the teacher's behavior to the teacher's inexperience.

(3) During her employment, claimant came to think that her work situation was hostile. Once, claimant was standing in the classroom observing the students' reactions to a new student. The principal saw claimant standing and watching, asked claimant what she was doing and commented, "You look awkward." Audio at ~14:20. Claimant thought that the principal's comment was unfriendly.

(4) On March 7, 2017, an autistic student wandered away from the teacher and the other students while they were gathered outside the building for a fire drill. Another teacher observed the autistic student and brought that student back to his teacher. Claimant spoke to the school principal about the teacher having lost track of the autistic student during the fire drill. The principal told claimant that the teacher was still learning and asked claimant to "keep working with her." Audio at ~ 16:32. Claimant thought that the teacher was not ensuring the safety of the students who were in her class.

(5) Before April 3, 2017, the principal thought claimant's main concerns about the teacher involved how the teacher communicated with claimant. On April 3, 2017, while claimant was on break, the teacher and another instructional aide lost track of an autistic student as they were returning to the classroom. Claimant returned from break almost simultaneously with the return of the teacher and the instructional aide. The teacher told claimant to find the autistic student and bring him back. Claimant located the child a long way down the hallway, near the building lobby and the main doors to the building. Claimant again thought that by this behavior the teacher was not ensuring the safety of the students under her care.

(6) After retrieving the student on April 3, 2017, claimant decided she could no longer work with the teacher. Claimant made an appointment to speak that afternoon with the principal about the teacher's behavior. After making this appointment, claimant decided she was going to quit work. Although claimant was aware that a prior instructional aide for the teacher had transferred to a different school due to dissatisfaction with the teacher, claimant did not pursue an assignment to a different classroom or a transfer to a different school. On April 3, 2017, claimant called the employer's human resources representative and asked if she was required to give two weeks' notice of an intended resignation. After some discussion, the representative urged claimant to speak to the principal about her concerns before resigning or, in lieu of resigning, to seek a transfer to a different classroom or a different school. Claimant did not speak with the principal and did not seek a transfer.

(7) On April 3, 2017, claimant notified the employer that she was quitting work effectively immediately. Claimant did not return to work thereafter.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without 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.

While claimant contended she quit work due to her concerns about the students' safety when they were supervised by the teacher and the hostility of the work environment, the evidence she presented was insufficient to establish that either was a grave reason to leave work. In support of her claim that the safety of the students was in jeopardy, claimant cited the incidents on March 7 and April 3, 2017. Two isolated incidents in which autistic students briefly and temporarily wandered away from the teacher and one or both instructional aides does not necessarily show that the teacher's behavior endangered the students or showed that she was indifferent to their safety. It is not uncommon for students sometimes to stray from the immediate vicinity of a teacher unnoticed, especially when the teacher is responsible for more than a single student. Absent evidence showing that the teacher regularly lacked diligence in supervising students or that the teacher's behavior on the days those incidents occurred was callously inattentive, it cannot be inferred that the teacher posed a threat to the safety of the students or that such inattention was a grave reason for claimant to leave work. Claimant also cited the teacher's abruptness with the students, holding hot coffee while interacting with students, her physicality in occasionally "grabbing" students and her smelling of cigarette smoke as additional bases for her concerns about the students. However, the evidence in the record is insufficient to show that such behavior on the part of the teacher fell short of the range of reasonably acceptable, posed dangers to the students or jeopardized their safety. Claimant did not meet her burden to show that a reasonable and prudent instructional aide would have concluded on this record that the teacher's behavior with the students was a grave reason to leave work. In addition, the single instance of allegedly hostile conduct by the employer, that the principal commented to claimant that she looked "awkward" while she was observing the students interact, is susceptible of many innocent, non-hostile interpretations. A reasonable and prudent person would not have concluded that the principal's isolated comment was a grave reason to leave work.

As well, even if claimant showed that one or more of the incidents she cited were grave reason(s) to leave work, she did not show that there were no alternatives to quitting. Claimant's testimony about the instructional assistant who transferred to another school rather than continuing to work with the teacher showed that claimant knew that, if another instructional assistant position was available, she might be able transfer rather than quitting work, and, in fact, a human resources representative also urged claimant to seek a transfer, further demonstrating the availability of doing so as an option to leaving her job. A reasonable and prudent person, who wanted to continue working, but could not tolerate working with the teacher to whom she was assigned, would not have concluded she needed to quit work until seeking a transfer and determining that such a transfer was not available.

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

DECISION: Hearing Decision 17-UI-84294 is affirmed.

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

DATE of Service: June 22, 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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