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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0259

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 161616). Claimant filed a timely request for hearing. On November 21, 2017, ALJ Frank conducted a hearing at which the employer failed to appear, and on November 29, 2017 issued Hearing Decision 17-UI-97814, affirming the Department's decision. On December 18, 2017, claimant filed an application for review with the Employment Appeals Board (EAB). On January 23, 2018, EAB issued Appeals Board Decision 2017-EAB-1458, reversing Hearing Decision 17-UI-97814 and remanding the case to the Office of Administrative Hearings for additional evidence. On February 15, 2018, ALJ Frank conducted a second hearing and on February 21, 2018, issued Hearing Decision 18-UI-103690, again affirming decision # 161616. On March 13, 2018, claimant filed an application for review of Hearing Decision 18-UI-103690 with EAB.

We considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) Pumpkin Fudge Joint Venture (aka Pumpkin Ridge Joint Venture) employed claimant from April 2017 until October 7, 2017 as a bartender and server.

(2) Claimant has an anxiety disorder and experienced panic attacks as a symptom of the disorder. Claimant managed her anxiety disorder with treatment throughout her employment.

(3) At hire, the employer representative told claimant that she would work full time in one of the golf course's public restaurants, but that the employer would reduce her hours during the golf course's off-season. The representative also told claimant that, if claimant "did a really good job," the employer might allow her to remain full-time by assigning her to work in different departments at the golf course.

Transcript (February 21, 2018 Hearing) at 6. Claimant initially worked 30 to 40 hours per week. Claimant had a short drive to the golf course.

(4) On May 14, 2017, claimant slipped, fell and was injured while at work. On May 15, 2017, she filed a worker's compensation claim. Claimant was unable to work until her doctor released her to return to full time work at the end of June 2017. During June 2017, the employer hired two other servers.

(5) Claimant received a warning for being late to work on June 30, 2017. Claimant was late due to illness.

(6) Beginning in July 2017, claimant sometimes experienced panic attacks after interacting with her manager, who yelled at her. On one occasion, the manager yelled at claimant because she tried to make a breakfast sandwich for a patron in the restaurant before a cook arrived. He told claimant, "If you did anything right for once in your life I wouldn't have to yell at you." Transcript (February 21, 2018 Hearing) at 18. On another occasion, he told claimant, "Make sure you clean up that filth [on the floor] so you don't fall again." Transcript at 19. Claimant complained to the employer's human resources director and the employer's corporate office about the manager's treatment of her. Human resources conducted a meeting with claimant, the manager and two other managers to discuss claimant's complaints.

(7) During the first three weeks of July 2017, claimant was given 26 hours, 14 hours and 22 hours to work, respectively. Exhibit 1, at 2-4. Claimant had requested some time off work in July and August to attend her parents' anniversaries.

(8) On July 25, 2017, the employer gave claimant a warning for allegedly leaving the restaurant unattended with customers in it on July 20.

(9) The employer began to reduce claimant's hours during September 2017, as well as the hours for some other employees. Claimant was earning $16 per hour, including tips. Claimant asked her manager and another manager for more hours and work in the private part of the golf club. Claimant also asked the banquet manager for work doing banquets. They did not give her more hours. The managers began training one other server as a lead server in the private part of the golf club and gave another server work doing banquets. Claimant was dissatisfied that the managers did not give claimant that work or more hours in her regular position.

(10) On October 4, 2017, before claimant's manager knew the golf course would be closed on October 10 and 11, he sent staff the work schedule for the week beginning October 8, 2017. Claimant was scheduled to work four shifts, totaling 24 hours, on that that schedule. At 6:20 p.m. on October 6, 2017, after the manager learned of the golf course closure, he sent staff an email stating that he changed the work schedule for the week beginning October 8, 2017 due to "aeration on ghost." Exhibit 1 at 18. The employer expected fewer patrons at the restaurant where claimant worked when the golf course was closed. In the new schedule claimant had only two shifts, totaling 14.25 hours. Claimant had a panic attack when she received the schedule with the reduced hours. Claimant asked her manager why he reduced her hours, and he stated, "That's just how it is." Audio Record at 21:57 to 22:06.

(11) On October 7, 2017, claimant quit work because the employer reduced her hours and because she was dissatisfied with how her manager treated her.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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 P2d 722 (2010). Claimant had an anxiety disorder, which is 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. If an individual leaves work due to a reduction in hours, the individual has left work without good cause unless continuing to work substantially interferes with her return to full time work or unless the cost of working exceeds the amount of remuneration received from work. OAR 471-030-0038(5)(e).

Claimant left work because the employer reduced her hours and because she was dissatisfied with how her manager treated her. With respect to claimant's dissatisfaction with the reduction in hours due to its financial consequences, we infer that claimant would have earned $228 gross income from the employer per week working 14.25 hours. In light of the minimal costs for working established in the record, claimant did not show that continuing to work would have exceeded the cost of working or substantially interfered with her return to full-time work. Thus, on this record, it does not appear that claimant's worsened financial condition due to the reduction in hours was good cause to leave work under OAR 471-030-0038(5)(e).

Claimant also contended that the employer reduced her hours in retaliation for exercising her right to file a worker's compensation claim. However, the record does not establish by a preponderance of evidence a causal link between the employer's actions and claimant's on-the-job injury. Claimant failed to show that the reduction in hours would not have occurred had claimant not been injured at work and filed a worker's compensation claim. Although claimant hoped to continue working full time through the fall, the record shows that the employer representative told claimant at hire that there generally was a seasonal reduction in hours. The weight of the evidence shows the employer reduced claimant's hours because it was doing a seasonal aeration of the golf course and anticipated claimant's restaurant would have a corresponding slowdown. Claimant was dissatisfied that she, unlike two other servers, was not given banquet work or trained to work in the employer's other restaurants, even though she was hired earlier in the season than those servers. However, there is no evidence to show that the employer was obligated to select claimant to continue working full time merely because it hired her a month earlier. Claimant did not establish by a preponderance of the evidence that the employer's apparent preference for those two servers' labor was due to claimant's injury or that claimant was the only employee who had a reduction in hours. *See* Exhibit 1. In sum, claimant did not show that the reduction in her hours was for retaliatory reasons.

Claimant also left work, in part, because of how her manager treated her. Claimant alleged his conduct was retaliatory for her having filed a worker's compensation. His conduct also triggered claimant to have panic attacks. Although some of the manager's statements were rude and insensitive, claimant failed to demonstrate that she faced a situation of ongoing oppressive or abusive conduct so grave that she had no alternative but to leave work when she did because of his conduct. Nor did claimant show that the warnings she received were retaliatory rather than coaching for occasions when she failed to follow the employer's policies. Moreover, claimant did not show that she had been singled out for mistreatment where other employees had also allegedly been "harassed" by him. *See* Claimant's Resignation Letter, Exhibit 1 at 20. Rather than leave work, claimant had the reasonable alternative of complaining to human resources again regarding the manager's behavior. Claimant did not show that it would have been futile to complain again to human resources, where human resources had responded to her initial complaints by conducting a meeting between claimant and the manager. We cannot conclude on this record that complaining again to human resources or to other members of management about her concerns would have been futile or unreasonable under the circumstances.

To the extent claimant left work because the anxiety she experienced may have adversely affected health, claimant failed to show that the effects were grave. Although the work caused her to experience two or more panic attacks during her employment, the record shows claimant managed her anxiety through medical treatment. Moreover, there is no evidence showing claimant's medical provider recommended claimant quit her job.

Given the evidence presented at the hearings, we cannot conclude that any reasonable and prudent person with the characteristics and qualities of an individual with anxiety would have felt she had no reasonable alternative but to quit work when she did. We therefore conclude that claimant voluntarily left work without good cause, and must be disqualified from receiving unemployment insurance benefits because of her work separation.

DECISION: Hearing Decision 18-UI-103690 is affirmed.

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

DATE of Service: <u>April 10, 2018</u>

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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