

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0317

Affirmed
Disqualification

PROCEDURAL HISTORY: On February 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110855). Claimant filed a timely request for hearing. On March 14, 2018, ALJ Meerdink conducted a hearing, and on March 15, 2018 issued Order No. 18-UI-105271, concluding the employer discharged claimant for misconduct. On March 29, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision, and considered claimant's argument to the extent it was based on the record.

We shall also address claimant's argument regarding certain procedural matters during the hearing. Claimant asserts in his argument that an employer witness was "being fed information" while testifying. Claimant's Argument at 1, 3. During the testimony from the employer's owner, the employer's manager appeared to assist the owner with finding a letter referred to in the owner's testimony. Transcript at 35-36. The ALJ instructed the witnesses that only the witness giving testimony should be speaking while the ALJ took her testimony. Transcript at 35. However, the record does not show that the owner was testifying from other than her personal knowledge. Claimant also argues that the owner's testimony lacked credibility because another witness told her what to say during her testimony. Claimant's Argument at 3. However, most of the facts relied upon for this decision are not in dispute. Claimant also asserts in his argument that he suffered an anxiety and panic attack during the hearing and had contacted the Office of Administrative Hearings (OAH) to ensure it was aware of his medical conditions, and that OAH made no accommodations for him. Claimant's Argument at 5. Claimant did not make any requests for accommodation during the hearing, the record contains no requests for accommodation to OAH, and we cannot evaluate OAH's response to the requests because claimant does

not state what accommodations he requested. Regarding claimant's medical issues during the hearing, the record shows that the ALJ advised claimant he could "take a break and . . . come back at another time to finish up [the hearing]," and asked claimant if he wanted to continue the hearing to another time. Transcript at 57. Claimant responded, "No, I'm – I'm fine," and continued to testify. *Id.* At no time did claimant tell the ALJ he needed to take a break or continue the hearing, even after the ALJ stated he was willing to do so.

FINDINGS OF FACT: (1) Sugar Shack Bakery, Inc. employed claimant from June 2017 until December 31, 2017 as a cleaner in its bakery; claimant quit work on January 1, 2018.

(2) Claimant was not a member of a union. Claimant had posttraumatic stress disorder and bipolar disorder.

(3) On November 27, 2017, claimant asked the employer's owner for a loan of \$1,200. Claimant proposed that, in exchange, he would work "on the books" rather than "for cash." Transcript at 21. The owner gave claimant a loan of \$600 on November 27 and told claimant to "come back in a few days" to receive the other payment. Transcript at 20.

(4) During December 2017, claimant's regular schedule was Friday through Tuesday from 7:30 a.m. to 3:30 p.m., except that he often did not work on Mondays due to lack of work. Claimant also sometimes worked Monday and Tuesday nights preparing donuts.

(5) On December 19, 2017, claimant heard his coworker, who was white, use the word, "nigger," repeatedly while conversing with another white person during a Tuesday night shift. Claimant was offended and is African American.

(6) On December 26, 2017, claimant told the owner about the incident on December 19 and that he would not work on Monday and Tuesday nights, when the other employee worked, because he did not want to work with the coworker who used racist language at work. The owner verbally reprimanded the employee who used the racist language and the manager told him he would be discharged if he used such language at work again.

(7) On December 27, 2017, claimant met with the owner to discuss his schedule and the second loan payment. The owner told claimant to return to his original schedule, which did not include Monday and Tuesday nights, and he would thus avoid working with the employee who had used the racist language. The owner also told claimant that she was unable financially to loan him the other \$600. The owner did not believe claimant would repay the loan.

(8) December 31, 2017, was the last day claimant worked. Claimant knew he was scheduled to work again on January 1 and 2, 2018, from 7:30 a.m. to 3:30 p.m., and from January 5 through 9, 2018, from 7:30 a.m. to 3:30 p.m.

(9) Claimant did not report to work on January 1, 2, or 5, 2018. During that time period, claimant left many voice messages and sent many text messages to the owner and manager stating that he was "on strike" and that he would not return to work unless the owner paid him the rest of the loan, and because he was dissatisfied with the employer's response to his complaint about the employee who used racist

language at work. Transcript at 45. After claimant failed to report to work on January 1, 2 and 5, the employer removed claimant from the schedule.

(10) By January 8, 2018, claimant had still not returned to work. He called the employer and the owner refused to speak with him. Another employee spoke with claimant and told him he was no longer employed.

CONCLUSIONS AND REASONS: We conclude claimant voluntarily left work without good cause.

The first issue this case presents is the nature of the work separation. If claimant could have continued to work for the same employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the same employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The testimony from claimant was inconsistent throughout the hearing as to whether he quit or was discharged by the employer. However, both parties agreed that claimant left multiple text and voice messages during the first week of January 2018 stating that he would not return to work unless the owner provided him with additional loan money and further disciplined the employee who used the racial slur on December 19. Given claimant's messages regarding his ultimatum to the employer about the conditions he required before he was willing to return to work, he objectively manifested an intention to leave work if his demands were not met. Although the employer's inability or unwillingness to meet claimant's demands resulted in claimant not returning to work, claimant could have continued to work, but chose not to do so. He set the conditions, not the employer. Thus, according to OAR 471-030-0038(2), the work separation was a voluntary leaving on January 1, 2018, the date when claimant first issued and acted upon his ultimatum that he would not work unless the employer gave him the loan and further disciplined the employee who used the racist language at work.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant had post traumatic stress disorder and bipolar disorder, which from claimant's description appear to have been permanent or long-term "physical or mental impairments" as defined at 29 CFR §1630.2(h). A claimant with those impairments 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 his employer for an additional period of time.

Claimant left work, in part, because the owner would not complete the loan he had anticipated. Despite the financial difficulties claimant faced due to the owner's decision that she could not afford to loan claimant additional money, the owner's decision was based on her own financial judgment and the employer had no obligation as an employer to loan claimant money. Even assuming *arguendo* that the owner had a contractual obligation to complete the \$1,200 loan, her failure to do so did not give rise to grave circumstances such that a reasonable person with claimant's health conditions would have no

reasonable alternative but to leave work. Claimant did not improve his financial situation by refusing to work. Claimant did not show that he had good cause to leave work because the owner refused to give him a loan.

To the extent claimant left work because he was dissatisfied with how the employer disciplined the employee who used the racist language at work, claimant did not show he had good cause to leave work when he did. Although claimant understandably found the language “very offensive” and was dissatisfied that the employee received only a verbal warning (Claimant’s Argument at 1), the record shows that the employer did not condone the employee’s conduct and immediately took affirmative action to stop the problem. The employer also permitted claimant to return to the schedule that did not include night shifts with the offending employee, and there is no evidence to show that other incidents occurred after the employee was reprimanded. A reasonable and prudent employee with claimant’s medical conditions, and financial difficulties that caused him to seek a loan from the employer and ostensibly made him want to remain employed, exercising ordinary common sense, would not have quit work where the owner and manager had already acknowledged the problem and reprimanded the employee and assured claimant that he did not have to work with that employee, and where the problem had not reoccurred.

On this record, claimant did not show good cause for leaving work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-105271 is affirmed.

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

DATE of Service: April 26, 2018

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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