

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0362

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 28, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 80053). Claimant filed a timely request for hearing. On March 26, 2018, ALJ Scott conducted a hearing, and on March 29, 2018 issued Order No. 18-UI-106258, affirming the Department's decision. On April 9, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB that contained new information not offered at hearing. EAB may consider new information that is not part of the record if the information is relevant and material to EAB's determination and the party offering the information demonstrates that circumstances beyond the party's reasonable control prevented it from offering the information at the hearing. OAR 471-040-0090 (October 29, 2006). Claimant offered emails from his partner that the employer's witness referenced during her testimony at hearing. The owner's testimony about the emails was not relevant to our decision, thus the emails themselves are not relevant or material to our determination and we therefore did not consider them in reaching this decision. As to the first page of a coworker's BOLI complaint also submitted by claimant to EAB, claimant failed to show that it was beyond his reasonable control to offer the information at the hearing and for that reason, we did not consider it in reaching this decision. We considered the remainder of claimant's argument to the extent it was based on information already contained in the record.

FINDINGS OF FACT: (1) Bear Printing employed claimant from March 16, 2015 until February 5, 2018, last as a pre-press technician, at the employer's printing business. The employer is small, family owned business with ten to 25 employees.

(2) Claimant felt his coworkers and the employer discriminated against him based on his sexual orientation and gender identity. Claimant is a gay man. Exhibit 1 at 2.

(3) In March 2017, claimant was offended when a coworker commented that claimant's time off work created extra work for other employees when claimant took time off work to be with his father-in-law in

the hospital before he died. Claimant complained to one of the owners. The owner spoke with the other employee about the matter. Claimant was dissatisfied with the employer's response to his complaint.

(4) During 2017, the same employee who made the comment to claimant about missing work in March 2017 made other comments to claimant about his appearance and sexual orientation, including implying that claimant would not enjoy camping because he was gay or could shave his head and wear a suit and tie as a Halloween costume.

(5) In June 2017, claimant complained to one of the two owners about how a coworker treated him in a rude manner and he felt like she "belittled" him. Exhibit 1 at 22. The owner discussed the matter with the other employee and advised her not to have further communication with claimant unless it was job related and others were present. Claimant subsequently noted that the employee would "completely ignore" him and "alienated" him. Exhibit 1 at 11-12. Claimant complained again to a manager about the employee and she told claimant to "drop the issue." Exhibit 1 at 12.

(6) In July 2017, the coworker claimant had complained about in June discovered an email claimant had sent to the employer complaining about her. She met with claimant, yelled at him, and asked claimant to go to her before going to the employer if he had complaints about her. Claimant felt additional stress as a result of the incident. He told one of the owners about the incident.

(7) During the summer of 2017, claimant became so bothered by the conduct that he perceived as discriminatory at work that "every moment I had outside of work was spent in conversation about it." Transcript at 17. Some days claimant felt "terrified" to go to work. Transcript at 19. He began to experience symptoms of anxiety and depression including insomnia, gastrointestinal problems, shaking, and sweats.

(8) In November 2017, claimant complained to the employer that the coworker he complained about in June 2017 had been "cold" and "hostile" toward him since "the summer," avoiding claimant and "putting him down." Exhibit 1 at 25.

(9) On December 20, 2017, one of claimant's female coworkers gave packets of movies to members of the staff as gifts. One employee asked another if he received "homemade porn" from the female coworker. Coworkers joked about sending photographs of one employee to another. Claimant presumed the coworkers meant pornographic photographs. He was offended by the sexual comments.

(10) On January 2, 2018, claimant began the process of filing a complaint with the Bureau of Labor and Industries (BOLI), alleging workplace discrimination based on his sexual orientation. Exhibit 1 at 2. Claimant told an owner he had filed a complaint with BOLI.

(11) During the first week of January 2018, claimant reported to an owner the statements he overheard regarding photographs of a coworker and "homemade porn" from December 2017. The owner investigated claimant's reports and told claimant she would like to have mediation that included claimant to promote a "team environment" at work. Exhibit 1 at 12. Claimant felt "uncomfortable" with and distrustful of mediation without an unbiased investigator. Exhibit 1 at 11. Claimant believed the owners favored certain employees. Claimant began using headphones all the time at work so he would no longer overhear his coworkers' comments.

(12) On January 10, 2018, claimant overheard a conversation among three employees joking about something on one employee's desk and commenting that it was "padded in all the right places." Exhibit 1 at 21. Claimant assumed the conversation was sexual in nature and was offended. Claimant was also bothered that day by employees he believed were engaged in gossip and avoiding him. Claimant was offended when he overheard two male employees joking about looking for "beautiful" or "petite" women. Exhibit 1 at 21.

(13) On January 11 and 12, 2018, claimant was sick due to work stress and used paid time off (PTO). One owner told claimant it was "fine" if he used PTO. Exhibit 1 at 12.

(14) On January 16, 2018, claimant was offended when he heard a coworker state that cats can choose their gender. Claimant felt the coworker was referring to claimant because of his hair and makeup and was "mocking the subject of gender identity." Exhibit 1 at 37.

(15) On January 18, 2018, claimant was sick due to work stress and used PTO.

(16) On January 26, 2018, claimant overheard two employees use his name in a conversation. Claimant believed the employees were gossiping about him and complained to one of the owners. The owner advised claimant that he should not eavesdrop on others' conversations or assume they are "gossiping" about him. Exhibit 1 at 27. Claimant was dissatisfied with the employer's response.

(17) Later on January 26, 2018, the two owners met with claimant and another employee about employee communications in the office. Claimant felt "intimidated" at times during the meeting by the tone of one owner's voice. The owner told claimant he would not pursue claimant's complaint from earlier in the day further unless claimant could show the two employees were speaking in a negative manner about claimant. During the meeting, claimant complained about a comment he overheard when an employee asked a coworker about shaving her private areas. Claimant was dissatisfied with the owners response to that complaint because he perceived that the owner did not consider it a sexual statement. Claimant told the owners that he had been taking time off work during January due to the impact of the work environment on him, making him feel anxious and lose weight – seven pounds in January alone. The owners offered for claimant to move his desk, but claimant declined because he felt he would overhear offensive comments no matter where his desk was located. Another employee was invited to part of the meeting because she was upset regarding how claimant had spoken to her about a work matter earlier in the day. The employee told claimant she and other employees were afraid to work with claimant for fear of offending him. Claimant felt he and the other employee resolved the disagreement and told the owners he wished the employer had offered mediation with other employees he had complained about.

(18) On January 31, 2018, claimant was offended when two employees discussed vaginas and gender identity in the employer's kitchen.

(19) On February 2, 2018, claimant was sick due to work stress and unable to work. Claimant had paid time off available and notified the employer he was sick and unable to work that day. One owner sent claimant an email at home stating, "This marks your 3rd Friday and 5th day of missed work in 4 weeks[.] As you have been notified . . . our PTO program is not . . . intended for use to create unscheduled long weekends[.] This creates additional stress on all of your co workers [sic] that must carry both their own

loads as well as cover for you[.] This behavior has become a pattern that needs to be addressed[.] This email serves as a warning at this time that this behavior needs to stop and that the next time it happens disciplinary action will be considered[.] This has all been noted in your employee record[.] If you have a doctors [sic] release for work today please send it to us ASAP otherwise we expect to see you at your post on Monday[.] Exhibit 1 at 6. Claimant was upset that the employer implied that he was using paid time off work when he was not ill.

(20) On February 3, 2018, claimant sought medical attention for his symptoms he attributed to work-related stress. The medical provider suggested claimant try medication and therapy for stress, and seek other work.

(21) On February 5, 2018, claimant quit work due to the impact of work stress on his health.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude claimant voluntarily left work with good cause.

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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010).

Although claimant had symptoms associated with anxiety and depression, the record does not show that claimant was diagnosed with anxiety, depression or another permanent or long-term physical or mental impairment as defined at 29 CFR §1630.2(h). Thus, on this record, there is insufficient evidence to apply the modified standard for showing good cause that is applied to a claimant with long-term or permanent impairments. To establish good cause to quit, claimant must show that no reasonable and prudent person would have continued to work for the employer for an additional period of time.

In Order No. 18-UI-106258, the ALJ concluded that claimant quit work without good cause, reasoning that claimant did not face an objectively grave situation of such gravity that continuing to work while BOLI investigated claimant’s complaint was not a reasonable alternative to quitting. Order No. 18-UI-106258 at 3. We disagree.

Claimant described a series of statements and isolating conduct by his coworkers beginning in June 2017 and continuing until the end of his employment. Claimant’s testimony regarding the statements from other employees and their conduct toward him was mostly unrefuted by the employer. The statements and conduct resulted in claimant having to take time off work due to illness. Additionally, the statements and conduct resulted in mutually poor working relationships between claimant and his coworkers and a mutual lack of trust between claimant and the owners, as evidenced by the owner questioning claimant’s use of paid time off for illness on February 2.

Claimant quit work because his working conditions made him sick and his efforts to improve them had failed. Claimant made multiple efforts, as did the employer, to improve the working conditions.

Claimant repeatedly reported statements and conduct by his coworkers that he found offensive. The employer addressed claimant's concerns by investigating claimant's complaints and speaking with the coworkers. Claimant began a BOLI complaint in January and continued to work for an additional month after he told the employer about the BOLI complaint. Claimant's working conditions did not improve during that time. Rather, claimant's health continued to deteriorate to the extent that his medical provider suggested he consider therapy, medication and finding other work. The effect claimant's working conditions had on his health made continued employment a grave situation for claimant, and it appears that claimant exhausted reasonable, non-futile alternatives to quitting work. No reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working for the employer under the circumstances described.

Claimant quit work with good cause. He is not disqualified from receiving unemployment insurance benefits because of his work separation.

DECISION: Order No. 18-UI-106258 is set aside, as outlined above.¹

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

DATE of Service: May 11, 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.

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.

¹ 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.