

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0482

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 29, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 105516). Claimant filed a timely request for hearing. On May 1, 2018, ALJ Murdock conducted a hearing, and on May 4, 2018, issued Order No. 18-UI-108777, affirming the Department's decision. On May 8, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Ron Wilson Center employed claimant as a direct support worker at one of its assisted living facilities for mentally, physically, intellectually and behaviorally disabled adults from January 3, 2018 to March 19, 2018.

(2) Approximately two years prior to his employment, claimant was diagnosed by his psychiatrist as suffering from post-traumatic stress disorder (PTSD), bipolar disorder, depression, severe anxiety disorder and social anxiety disorder.

(3) When claimant was hired, he attended two weeks of classroom training including two days of training conducted by Oregon Intervention Services (OIS)¹ regarding the appropriate interventions to use with residents, such as physical holds for residents who exhibited aggressive, violent or other physically inappropriate behaviors at one of the employer's facilities.

(4) Shortly after claimant began his employment, he noticed potentially dangerous items such as knives and other sharp objects as well as chemicals were accessible to residents because they were not kept in locked locations. He also noticed that a resident in one facility where claimant sometimes worked possessed a flashlight that had a pepper spray gun and Taser built into it. That resident had at one time lit himself on fire. Claimant became anxious about the accessibility of such items to residents in case

¹ Oregon Intervention System (OIS) is Oregon's system of training and implementing the principles of Positive Behavior Support and Intervention for people who support adults and children with Intellectual/Developmental Disabilities who may display challenging behaviors. <https://www.oregon.gov/DHS/SENIORS-DISABILITIES/HCC/PSW-HCW/Pages/OIS-Training.aspx>.

one of them “[got] in a mood” and attacked a support worker, and suggested at a facility meeting that a protocol that restricted access by residents to such items be implemented. Transcript at 14. However, when claimant raised his concern the manager “brush[ed] it aside” and did not follow up on it, which made claimant more anxious. Transcript at 18.

(5) On Saturday, March 17, 2018, claimant was assisting residents at a facility in the dining room when one resident began to call another “bitch” and “asshole” and the other responded by calling the first “fat boy.” Transcript at 5-7. When claimant tried to defuse the situation, the first resident called claimant an “asshole”, picked up his fork and began thrusting it toward claimant in a stated effort to “stab” him, after which the resident threw it at claimant. *Id.* The situation was eventually resolved, but the resident’s behavior made claimant begin to “fear for his life,” particularly when he realized that there was no protocol in place for residents’ violent behavior that would restrict them from accessing potentially dangerous objects. *Id.* Claimant finished his shift and over the weekend prepared an incident report.

(6) On March 19, 2018, claimant came in to work and discussed the March 17 incident with the employer’s human resources manager when turning in his incident report. He told her that due to his anxiety, the lack of a protocol for that resident and the lack of a protocol that generally restricted residents’ access to dangerous objects, he “feared for his life” when at work and was resigning. Transcript at 10. Before resigning, claimant spoke with the employer’s service manager about his decision to resign and turned down an offer to transfer to the facility where the resident who tried to light himself on fire resided. The service manager also suggested the employer “could see” about transferring claimant to another shift that “could be available” at some point, which claimant also declined.

CONCLUSIONS AND REASONS: We disagree with the Department and the ALJ. Claimant voluntarily quit work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he (or she) 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 P2d 722 (2010). For several years, claimant had been diagnosed with post-traumatic stress disorder (PTSD), bipolar disorder, depression, severe anxiety disorder and social anxiety disorder, 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 impairments would have continued to work for the employer for an additional period of time.

In Order No. 18-UI-108777, the ALJ concluded that claimant quit work without good cause, reasoning that although the circumstances claimant encountered, “given his long-term or permanent mental impairments” were grave for him, claimant “could at least have transferred to another of the employer’s facilities and work[ed] with a different set of residents with different types of disabilities and needs rather than quit work.” Order No. 18-UI-108777 at 3. We disagree and conclude the record shows that

the work in question was unsuitable for claimant given his impairments, and that the alternatives offered by the employer were not actual, concrete and reasonable alternatives to quitting.

ORS 657.190 provides that in determining whether any work is suitable for an individual, the Department shall consider, among other factors, “the degree of risk involved to the health, safety and morals of the individual...as well as their... physical fitness and prior training, [and] experience.” On this record, the nature of the employer’s work, which involved daily interactions between support staff, oftentimes working alone, and potentially aggressive, threatening, violent and unstable residents in any of their facilities, created a substantial degree of risk to the health and safety of claimant, who suffered from severe anxiety in multiple forms, including post-traumatic stress disorder, especially given the lack of general employer protocols that restricted residents’ access to dangerous instrumentalities. More likely than not, the nature of the employer’s work was unsuitable for claimant and, for that reason alone, left him with no reasonable alternative but to quit.

Although the employer’s human resources manager asserted that the service manager explored with claimant the *possibility* of moving to another location, either the location with the resident who reportedly lit himself on fire or some other unspecified location or shift within the employer’s system, the first location would not have been a reasonable alternative given claimant’s anxiety and fears regarding violent residents and the latter option was at best only speculative at the time claimant quit. Accordingly, there is insufficient evidence in this record to establish that a transfer to a different, less stressful shift or residence was an actual, concrete and reasonable alternative for claimant. *See Gonzales v. Employment Department*, 200 Or App 547, 115 P3d 976 (2005) (evidence insufficient to show claimant’s theoretical transfer to a different job was a reasonable alternative when no evidence that employer actually checked and confirmed that such a job was available and that claimant was qualified and capable of performing that job).

Viewing the record as a whole, claimant demonstrated that his circumstances were grave and that, when he left work, he had no reasonable alternative in lieu of doing so. Claimant had good cause for leaving work when he did, and he is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Order No. 18-UI-108777 is set aside, as outlined above.²

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

DATE of Service: June 7, 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

² This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

'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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