

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0508

Affirmed
Disqualification

PROCEDURAL HISTORY: On March 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 125424). Claimant filed a timely request for hearing. On April 20, 2018, ALJ Scott conducted a hearing, and on April 26, 2018 issued Order No. 18-UI-108205, affirming the Department's decision. On May 16, 2018, 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. Claimant did not explain why she was unable to offer this information during the hearing, and otherwise failed to show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090 (October 29, 2006). For this reason, EAB did not consider claimant's new information and considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Richard Rizk Attorney at Law employed claimant as a legal assistant and receptionist from February 5, 2018 until March 2, 2018.

(2) In 2013, claimant was diagnosed with post-traumatic stress disorder (PTSD) and anxiety. Claimant received medication for those conditions as well as talk therapy. During the time the employer employed claimant, claimant's conditions were well managed and neither of them influenced her behavior, perceptions or reactions to the employer's workplace.

(3) Before hiring claimant, the attorney who owned the employer was unable to check the references that claimant had supplied and did not conduct a background check. After claimant began work, the attorney observed certain interactions between claimant and other staff that concerned him and wanted to check claimant's background. Sometime on or before March 1, 2018, the attorney searched claimant's name on Google and it appeared that claimant had previously used at least three different last names.

(4) On March 1, 2018 at 9:47 a.m., the attorney sent claimant an email which he copied to the employer's IT department. The email stated,

What prior names have you gone by? I could not complete a background check on you earlier as I did not have that info. I am checking new employees. Please reply to all.

Exhibit 2 at 14. Upon receiving this email, claimant observed that it was copied and concluded that, by the copy, the attorney expected her to disclose all prior names to the attorney's investigator and that the investigator would be performing the background check for the employer. Claimant did not want to disclose her prior names to the investigator since it was private information that she wanted to keep confidential, and claimant did not trust the investigator to keep private that information or any information he discovered in the course of researching her background.

(5) On March 1, 2018 at 10:49 a.m., claimant responded to the attorney's email. That email stated,

I am only comfortable working directly with a third party company who is reputable and specifically runs employment background checks. They understand the rights of privacy of individuals in these matters (regarding potential employees, or in this case current employees). They can answer appropriate questions you have regarding an employee or applicant. They reserve [sic] the employees and applicants personal information & privacy that is protected. These are companies that corporations such as OHSU, trustee offices, staffing companies etc. utilize [to perform background checks] (for these reasons).

Exhibit 2 at 14.

(6) On March 1, 2018 at 11:08 a.m., the attorney replied to claimant's email. The reply email stated,

I undergo periodic background checks myself. The bigger issue is that we need to develop trust. I'm still learning who you are. Usually a name is a first step toward that. I leave it up to you.

Exhibit 2 at 16.

(7) Based on the emails she had exchanged with the attorney, claimant concluded that the attorney was "very manipulative" and did not respect "professional boundaries." Transcript at 7, 17. After lunch on March 1, 2017, claimant told a coworker that she was not feeling well and needed to go home and gave her office keys to the coworker. After claimant left the workplace, claimant decided she would not return because of the attorney's response to her email of March 1, 2018.

(8) On March 2, 2018, claimant contacted a coworker and told the coworker she was quitting work. That day, claimant voluntarily left work.

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). Claimant had PTSD and anxiety, 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 her employer for an additional period of time.

While claimant appears to have permanent or long-term mental impairments, her testimony indicated that those impairments were so well controlled that they did not influence behavior or reactions to occurrences in the workplace during the period in which the employer employed her. It appears as a practical matter that, despite the existence of claimant’s conditions, claimant’s characteristics and qualities at the time she left work were substantially the same as those of a reasonable and prudent person of normal sensitivity.

Claimant made the decision to leave work after the attorney replied “I leave it up to you” in response to claimant’s stated reluctance to disclose any prior names she had used, which would have enabled the employer to perform a background check. As a matter of common sense, a legal assistant in an attorney’s office likely will have access to clients’ confidential and privileged information, and to ensure that information is protected, the attorney has a legitimate business reason to perform background checks on staff who will be privy to such information, which may reasonably involve an inquiry into all prior names that claimant or other staff have used to perform an adequate check. It does not appear that the attorney’s mere request that claimant disclose her prior names, in and of itself, gave rise to a grave situation. Nor does it appear that the attorney’s comment stating that he left it to claimant to decide if she would supply the information gave rise to a grave situation. Nothing about that comment on its face or in the surrounding context suggests, for example, that it was an explicit or implicit threat or that the employer would discharge claimant or take other punitive measures if she did not make the requested disclosure. The comment is equally susceptible of an interpretation that, in light of claimant’s response, the attorney intended to drop the matter of the requested disclosure if claimant continued to demur. In sum, claimant did not show that the attorney was intending to do anything, let alone anything of gravity, if claimant chose not to divulge any other names by which she had been known.

Claimant also did not explore all reasonable alternatives before deciding to leave work based what she had inferred about the attorney’s request for information. Claimant reasonably could have, but did not clarify with the attorney whether the investigator, rather than a reputable company, was actually going to perform the background check if she disclosed her prior names. Claimant also reasonably could have inquired of the attorney what he meant by the comment, “I leave it up to you,” and if he meant he would let the matter would drop if claimant chose not to disclose the prior names she had used, or if he meant he was going to discharge claimant or take punitive actions based on a refusal to divulge any prior names by which she had been known. On this record, a reasonable and prudent person with the type of PTSD and anxiety that claimant experienced would not have decided to leave work based on the comment, “I leave it up to you,” until she had asked the attorney to explain what he meant by it and its

implications, if any, to her employment. It does not appear that claimant explored reasonable alternatives before she decided to leave work.

Aside from attorney's comments in the March 1, 2018 email exchange, claimant also generally contended that she left work because she did not feel safe in the workplace, she disliked the behavior of the attorney and certain other staff, and she disliked workplace immorality. Although claimant made these conclusory assertions, they were not supported by concrete and specific evidence at hearing. Claimant did not meet her burden to show, more likely than not, a lack of safety or morality in the workplace, or that this or other aspects of the workplace constituted a grave situation.

Claimant did not show more likely than not that she had good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-108205 is affirmed.

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

DATE of Service: June 18, 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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