

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0630

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 16, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct within fifteen days of claimant’s voluntary quit without good cause (decision # 153521). Claimant filed a timely request for hearing. On June 12, 2018, ALJ Murdock conducted a hearing at which the employer failed to appear, and on June 13, 2018 issued Order No. 18-UI-111249, affirming the Department’s decision. On June 20, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On January 3, 2018, a new owner purchased India Kitchen and Steakhouse and employed claimant from that date until April 30, 2018 as the bar manager and day shift bartender.

(2) At the beginning of April 2018, the employer hired a new employee to work as the night shift bartender. The employer’s owner instructed claimant to act as the new bartender’s manager and to give her instructions each day when she came on shift before the end of claimant’s day shift.

(3) The new bartender used foul language toward claimant and refused to follow claimant’s instructions immediately from hire. Claimant began giving the bartender directions away from customers and other employees to avoid angering her. When claimant gave the bartender instructions, the bartender replied, “Mind your own fucking business.” Audio Record at 8:23 to 8:26. On another occasion, she told claimant, “I don’t have to do what you fucking [say] . . . I’m too busy.” Audio Record at 11:16 to 11:20. The insubordinate conduct occurred every time claimant worked with the bartender. Claimant reported each incident to the owner and asked the owner to help her. The owner told claimant, “I do not want to be confrontational. You deal with it. You deal with it.” Audio Record at 8:37 to 8:41.

(4) The bartender continued to use foul language toward claimant and refuse to follow claimant’s instructions despite claimant’s complaints to the owner. The new bartender told claimant she disliked her and was angry with her because she wanted to work claimant’s shift, the day shift. Claimant complained to the owner again, and the owner told claimant, “There’s really nothing I can do.” Audio

Record at 10:31 to 10:33. The owner told claimant she did not have time to address the bartender's conduct.

(5) On approximately April 21, 2018, a customer told claimant that the new bartender had described claimant as a "fat old bitch" to customers in the bar the night before. Audio Record at 9:57 to 9:58. Claimant had the customer tell the owner about the incident and the owner said she would try to talk to the new bartender. Claimant reminded the owner that she had been asking for help for two weeks. The owner did not speak to the new bartender about her conduct.

(6) On April 23, 2018, the owner asked claimant to work the new bartender's shift that night because the new bartender had been arrested for assaulting her neighbor.

(7) The employer did not have enough bartenders to schedule claimant to work when the new bartender was not working, and the owner was not willing to hire new staff.

(8) On April 25, 2018, the new bartender and claimant were at work, and claimant asked the new bartender if she was in a "bad mood." The new bartender replied to claimant, "Leave me the fuck alone. I went to jail for beating up my neighbor. I'd just as soon beat you up, too, if you don't get off my back." Audio Record at 17:03 to 17:05, 16:12 to 16:17. Claimant did not call the police because she did not believe the police would pursue the matter where the bartender did not assault her. Claimant told the owner what the bartender had said and obtained permission to leave work early.

(9) After her April 25, 2018 shift, claimant sent the owner a text message stating she felt sick due to the stress from the bartender's threat that day and was unable to work on April 26. On April 26, 2018, claimant told the owner she could no longer handle the stress of working with the new bartender and gave notice that she would quit on May 10, 2018.

(10) On April 30, 2018, the owner sent claimant a text stating that she would work the remainder of claimant's shifts because claimant no longer wanted to work for the employer.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer discharged claimant, not for misconduct.

In Order No. 18-UI-111249, the ALJ determined that the provisions of ORS 657.176(8) applied to claimant's work separation. ORS 657.178(8) provides that, when an individual has notified an employer that she will leave work on a specific date and it is determined that the voluntary leaving would be for reasons that do not constitute good cause, and the employer discharged the individual not for misconduct within 15 days prior to the planned voluntary leaving, then the separation from work is adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. The individual is still, however, eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date.

The ALJ concluded that claimant planned to voluntarily leave work, but did not have good cause to do so, and that the employer discharged claimant, but not for misconduct, within 15 days of the date on which she planned to leave. Applying the provisions of ORS 657.178(8), the ALJ determined that claimant was disqualified from benefits, effective May 6, 2018, until requalified under Department law.

We disagree with the ALJ's conclusion because we conclude that claimant had good cause for her planned voluntary leaving.

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) (January 11, 2018). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Claimant planned to quit her job because of the behavior of the new bartender. The bartender repeatedly used foul language toward claimant and was insubordinate to claimant's direction. Her conduct did not improve despite claimant's many complaints to the owner. Claimant was also frightened by the bartender's threat on April 25 and felt she could no longer handle the stress of working with the bartender. The ALJ found that claimant did not face a grave situation at work reasoning that claimant did not consider the threat serious because she gave two weeks' notice rather than quit immediately and did not call the police.¹ However, the record shows that claimant was afraid of the bartender, and her fear was reasonable because the bartender was apparently capable of such conduct because she arrested for assaulting a neighbor the same week she threatened claimant. Moreover, she told claimant she disliked her, was repeatedly verbally abusive toward claimant, and her conduct had escalated over time from verbal abuse to a verbal threat, and there is no evidence the employer took any action to keep claimant safe, which might also tend to embolden the new bartender. No reasonable and prudent person would endure the type of abusive behavior in which claimant's coworker engaged, especially where it involved a threat of assault without any response from the employer. *See McPherson v. Employment Division*, 285 Or 541, 557, 591 P2d 1381 (1979) (a claimant is not required to "sacrifice all other than economic objectives and *** endure racial, ethnic, or sexual slurs or personal abuse, for fear that abandoning an oppressive situation will disqualify the worker unemployment benefits). *See also* Appeals Board Decision 11-AB-3308 and Appeals Board Decision 11-AB-2272 (supervisors' fits of temper and verbal abuse created good cause for voluntarily leaving work). The fact that claimant did not leave work immediately and planned to work out a notice period does not minimize the threat she felt from continuing to work with the new bartender under the circumstances described, particularly where, as here, the employer did not take steps to address or resolve claimant's concerns during the notice period. The record also shows that claimant did not have a reasonable alternative but to leave work. She complained repeatedly to the owner, and the owner did nothing to intervene or assist claimant. There is no evidence to show that any other remedy was available for claimant.

For the reasons stated above, the record shows that claimant faced a grave situation that left her no reasonable alternative but to quit her job when she did. Because claimant had good cause for her planned voluntary leaving, the provisions of ORS 657.178(8) do not apply. Instead, we now consider the reasons why the employer discharged claimant on April 30, 2018 under ORS 657.176(2)(a), which requires a disqualification from unemployment insurance benefits if the employer discharged claimant for

¹ Order No. 18-UI-111249 at 4.

misconduct. OAR 471030-0038(3)(a) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest.

The employer discharged claimant because claimant gave notice that she would quit due to the unsafe and abusive working conditions she perceived. Continuing to work in an unsafe or abusive environment such as that shown in the record here is not an expectation that an employer can reasonably expect its employees to meet. Thus, claimant's refusal to continue working indefinitely in such an environment was not a willful or wantonly negligent violation of the standards of behavior that an employer has the right to expect of an employee.

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from the receipt of unemployment benefits.

DECISION: Order No. 18-UI-111249 is set aside, as outlined above.²

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

DATE of Service: July 23, 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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² This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits, if they are owed, may take from several days to two weeks for the Department to complete.