

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0632

Affirmed
Disqualification

PROCEDURAL HISTORY: On May 1, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 111840). Claimant filed a timely request for hearing. On June 5, 2018, ALJ Kangas conducted a hearing, and on June 7, 2018 issued Order No. 18-UI-110909, affirming the Department's decision. On June 25, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's written argument contained information that was not in the hearing record. Claimant did not show that she was prevented by factors or circumstances beyond her reasonable control from presenting this information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). For this reason, EAB considered claimant's written argument only to the extent it was based on information already in the record when reaching this decision.

Because no party objected to the admission of Exhibit 1 into the record during the time set forth in Order No. 18-UI-110909, Exhibit 1 will remain in the record.

FINDINGS OF FACT: (1) Lab Express Portland, Inc. employed claimant assisting in its office from October 16, 2017 until February 13, 2018.

(2) Very shortly after claimant was hired, the employer's owner told claimant that her supervisor had been in prison, to "be careful [and] be nice to her" and that he "wouldn't want to be on her [the supervisor's] bad side." Transcript at 21, 36. During claimant's employment, claimant's supervisor would frequently yell at her in a "very loud voice" about mistakes she made and would "chew [claimant's] head off." Transcript at 19. Claimant's supervisor also told claimant that she had served time in prison. Claimant became afraid of the supervisor because she "didn't know what she [the supervisor] was capable of." Transcript at 25.

(3) In approximately mid-October 2017, claimant heard her supervisor use the word "nigger" at work. Transcript at 9. The supervisor knew that claimant was married to an African-American man. On

December 12, 2017, claimant's supervisor again used the word "nigger" in the workplace. Sometime in January 2018, claimant overheard the supervisor comment to one of claimant's coworkers as she was cancelling the direct deposit of an African American coworker's paycheck that she was doing so "because of how black people are with their money" and "you can't understand black people." Transcript at 17. On approximately January 25, 2018, claimant's supervisor again used the term "nigger" at work. In addition to being intimidated by the supervisor's demeanor at work, claimant was offended by what she perceived as the racism of the supervisor and thought the supervisor was trying to antagonize her by making racist references.

(4) Sometime before approximately February 7, 2018, claimant took a call from a nurse in which the nurse stated that she wanted to speak to a supervisor to complain about an employee she identified by name. The employee who was the subject of the complaint was claimant's supervisor. Claimant told the nurse that the employee about whom the nurse was complaining was a supervisor. The nurse then asked for contact information about the supervisor's supervisor, and claimant gave the nurse contact information for the employer's owner. When claimant's supervisor learned of what had transpired during the call, the supervisor became very angry with claimant and yelled loudly at claimant. Claimant thought the supervisor's behavior was "scary." Transcript at 22.

(5) On February 7, 2018, claimant's supervisor interviewed three female applicants for a phlebotomist position: two applicants were African-American and one was white. After the interviews were completed, claimant overheard the supervisor comment to one of claimant's coworkers that "he didn't have to worry, she was gonna hire a white woman this time." Transcript at 8. Claimant thought that the supervisor's comment was another exhibition of her racism.

(6) On February 12, 2018, claimant sent an email to the employer's owner to inform him that she was afraid of her supervisor and thought the supervisor was a racist. Claimant asked the owner if she could work different hours from those of her supervisor or if she could work from her home to avoid interacting with the supervisor. Later that same day, the owner responded to claimant's email by text message, stating that he had spoken to the supervisor and she "will be the one walking on eggshells [around you]" and suggesting that claimant report for work at 1:00 p.m., because that was when he thought claimant's supervisor generally was outside the workplace and had left for home. Transcript at 28, 37-38. The owner's text continued, "From now on you do not report to her [the supervisor]. You ask for tasks from her but you report to me directly." Transcript at 28. Claimant replied, texting, "While I understand you probably had to address this with her [the supervisor], I do not feel safe or comfortable being alone with [the supervisor] in the office." Transcript at 28. The owner responded to claimant's message about not feeling safe or comfortable by stating, "Come back in at 1:00 p.m. and she [the supervisor] won't talk to you. She'll be in her office doing the schedule and there will be no personal talk." Transcript at 29. Claimant replied that she did not feel "comfortable" or "safe" with the supervisor. Transcript at 29, 39-40.

(7) On the morning of February 13, 2018, the owner responded to by stating, "[I]f you still feel that way in spite of my reassurance, you just have to turn in your total hours so we can write and send your last check ASAP." Transcript at 30, 40. Claimant replied "Okay, I have given [the supervisor] my hours already. I will turn in my keys this week," to which the supervisor's supervisor responded, "Can you turn in your keys to the office?" Transcript at 30, 40. Claimant responded, "Yes. Just to be clear, I never wanted the situation to end my employment. I do not feel I can really work alone in one office

with [a] person that creates a hostile work environment [and] who happens to be my superior []." Transcript at 40. The owner replied, "I didn't want [it] either. That is why I suggested you come in when she goes. You said you cannot work with her." Transcript at 45. Claimant responded, "I don't mean to be blunt but I just looked back at my messages and that was never suggested. It was suggested I come in when she is busy with the schedule." Transcript at 46. After sending this message, claimant activated a function on her phone to block all further communications originating from the phone of the owner. The owner replied to claimant's last text message, "She leaves right after that. If you come in at 1 p.m., she will be on her way out in an hour or less." Transcript at 40. Immediately upon transmitting this text message to claimant, the owner received a message informing him that claimant's phone was "unable to receive [the message], blocking is active." Transcript at 41. The owner then sent claimant a message asking her to call him to continue the exchange by voice, but that message was also blocked. Transcript at 40-41.

(8) When claimant blocked further communications from the owner on February 13, 2018, the owner was trying to clarify why claimant did not think that coming in at 1:00 p.m., after he thought the supervisor would be leaving for the day, would achieve her desire of avoiding workplace contact with the supervisor, or if claimant had not understood that it was his intention to accommodate her. The owner was and had been "willing to bend backwards" and "shift things around" to retain claimant as an employee. Transcript at 42. Claimant would not have left work had she known the employer was willing to change her work schedule so that the supervisor would not be on the work premises at the same time she was. Transcript at 44-45.

CONCLUSIONS AND REASONS: Claimant voluntarily let work without good cause.

While the employer contended that claimant quit work, claimant contended that she had not intended to do so. Transcript at 5. The first issue this case presents is the nature of claimant's work separation. OAR 471-030-0038(2) (January 11, 2018) sets out the framework for characterizing a work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

It was not disputed that the employer did not tell claimant she was discharged, terminated, fired or the like. It also was not disputed that claimant would not have left work had she understood that, by his text messages on February 12-13, 2018, the owner intended to schedule claimant in a way that prevented her from being alone in the workplace with her supervisor, and if beginning work at 1:00 p.m. would not achieve that result, the owner likely was willing to preserve the employment relationship by making other arrangements to achieve that result. Transcript at 42-45. By unilaterally blocking further communications with the owner on February 13, 2018 and cutting off any chance of resolving her concerns short of a work separation, in the midst of an ongoing discussion via text messages, claimant manifested an unequivocal unwillingness to continue the employment relationship. Because claimant expressed an intention to sever the work relationship at a time when the owner was trying to preserve that relationship and continuing work remained available to her, claimant's work separation was a voluntary leaving, effective February 13, 2018.

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). 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.

Assuming that working with her supervisor created a grave situation for claimant, the employer’s owner was willing to accommodate claimant by taking steps to minimize contact between claimant and the supervisor or even to ensure claimant would not be required to work when her supervisor was on the premises. However, even if claimant did not understand that was the owner’s intention by proposing that she not come into work until 1:00 p.m., or that coming in at 1:00 p.m. would not have ensured that claimant would not be able to avoid contact with the supervisor, by blocking communications from the owner when he was in the process of trying to explain his intentions and reach an acceptable resolution, claimant did not pursue a reasonable alternative that was available to her. A reasonable and prudent person would not have decided to leave work without first making a reasonable effort to work with the owner to eliminate that contact, and claimant’s decision to block the owner’s texts prematurely ended that effort. Because claimant left work at a time when she had reasonable alternatives to leaving, claimant did not meet her burden to show that she had good cause for leaving work when she did.

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

DECISION: Order No. 18-UI-110909 is affirmed.

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

DATE of Service: July 31, 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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