

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0716

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 140006). Claimant filed a timely request for hearing. On May 9, 2018, ALJ Schmidt conducted a hearing, and on May 10, 2018 issued Order No. 18-UI-109121, affirming the Department's decision. On May 16, 2018, claimant filed an application for review with the Employment Appeals Board (EAB). On June 15, 2018, EAB issued Employment Appeals Board decision 2018-EAB-0516, reversing Order No. 18-UI-109121 and remanding the case to the Office of Administrative Hearings for additional evidence. On July 9, 2018, ALJ Schmidt conducted a second hearing, and on July 10, 2018 issued Order No. 18-UI-112800, again affirming the Department's decision. On July 16, 2018, claimant filed an application for review of Order No. 18-UI-112800 with EAB.

EAB considered the entire hearing record from both hearings, including all of the email evidence, and both of the claimant's written arguments to the extent they were based on information received into evidence at the hearings. *See* ORS 657.275(2); OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) OB Sports Golf Management Sand LLC employed claimant as the food and beverage manager at its golf course in Florence Oregon from August 5, 2016 to February 16, 2018.

(2) When hired by the employer, claimant had more than 30 years' experience in the food preparation and catering business, having owned her own café, won numerous catering awards and successfully managed kitchen staff, which she believed needed "positive reinforcement... at all times." Exhibit 1. The employer hired her, in part, "to get [its] restaurant in order" which she believed included the authority to make managerial decisions regarding staff, menu items and how the kitchen was run. Exhibit 1.

(3) In April 2017, claimant's supervisor (RR), the general manager of the golf course, questioned her about leaving the employer's premises during work hours, without clocking out, to provide her 18 year-old son, who also worked for the employer, a ride to work. After their meeting, claimant emailed an employer Human Resources specialist (KB) to document a complaint against RR because she believed

his questioning was inappropriate because her son was an adult, she was on a state mandated break, and she believed RR had no right to question her about how she spent time on her breaks. She also believed RR had implicitly threatened her son's job if he lacked the necessary work transportation. She wanted her complaint on record in case there were later repercussions against either her or her son based on the incident, but there were none.

(4) In June 2017, claimant sent a series of emails to KB complaining about how RR refused to allow her to "run and clean my kitchen as I see fit." Exhibit 1. After returning to work after being off one day, she discovered that the kitchen grill had been cleaned "in a way that I have specifically said not to do" based on direction from RR. Exhibit 1. The complaint described decisions concerning claimant's responsibilities being made by RR without discussion with her, which she considered an overstepping of boundaries and "micromanaging." Exhibit 1. She further complained that RR "swears and uses phrases like 'I'm not trying to be a dick' when he spoke to her, but claimant also admitted to "being disrespectful" to RR. Exhibit 1. Claimant acknowledged to KB that RR had told her that KB had spoken to him about claimant's complaints, but added that it all could have been avoided if RR had communicated with her before acting.

(5) In August 2017, claimant had a disagreement with RR after he told her she could no longer bring her 10 year-old child to work after allowing her to do so for several weeks. She complained to KB about RR's decision, but KB responded that RR had first spoken to her about it, and she had confirmed that it was against the employer's policy to allow employees to bring their children to work with them for safety and liability reasons.

(6) On February 2, 2018, RR called claimant into his office to discuss some general kitchen topics and the need to reduce kitchen staff hours due to a slow period. RR objected to a change claimant intended to make regarding soup and salad service prior to entree service, and claimant questioned why he needed to be involved at all because that was her area of responsibility. Claimant then described how many of the changes she had made since her hire, without his intervention, had made the restaurant more profitable and that she wanted him to defer to her judgment in that area rather than go around her to make changes without her input. He reportedly smirked and laughed at claimant's comments and stated, "oh sure Diane...it's all about you." Audio Record (May 9, 2018 hearing) at 18:30 to 20:30. Claimant considered his comments and attitude during their meeting to be insulting, disrespectful and hostile. At its conclusion, she gave him two weeks' notice of her intent to quit and followed that up with an email to KB concerning the same, and that she was quitting due to the "attitude and disrespect" towards her shown by RR during the meeting. Exhibit 1. She closed her email with, "I expect a response that takes this situation seriously" and "I want results." Exhibit 1.

(7) On February 8, 2018, KB responded by email that she was sorry claimant felt the need to quit because she believed claimant had been very beneficial to the growth of her department. She stated that she was aware from their past discussions that claimant's relationship with RR had been a struggle and that both she and RR's supervising vice president had conducted training discussions with him to improve his working relationships with employees. She then offered to set up and mediate a three-way meeting between them to try to iron out some of the issues if claimant thought it would help. Exhibit 1.

(8) Later that day, claimant responded by email stating, in part, "I do not feel that a conversation between the three of us would be beneficial because of his lack of propriety, his lack of respect, and his

need to consistently point out that HE is the GM...I appreciate your time but unless you're going to completely change the man and make him respect me and my position...then I do not see the benefit at all." Exhibit 1.

(9) On February 9, 2018, claimant sent another email to KB. "I have taken the time to review our email conversation. I find that your responses are passive and pacifying...The only alternative you have given me is to have a conversation between you, me and [RR] via telephone. I have to ask after everything that I have said about the situation, why would you expect me to sit and speak rather than [you] confronting the situation head on with the other party?" Exhibit 1. Shortly thereafter, KB responded, "At this point, I don't believe that the working relationship between [RR] and yourself will be repaired even if we sit down and talk. You have given your two weeks' notice and we wish you all the best." Exhibit 1.

(10) On February 16, 2018, claimant quit work due to what she believed was a hostile working environment.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude 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). 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.

At hearing, claimant testified that the general manager had created a hostile working environment for her for the better part of a year, citing "lots of belittling and yelling, swearing" in addition to the final meeting on February 2, 2018. Audio Record (May 9, 2018 hearing) at 13:00 to 13:30. A hostile working environment can, under some circumstances, amount to good cause to leave work. *See, McPherson v. Employment Division*, 285 Or 541, 557 (1979) (claimants 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 from unemployment benefits"). When the ALJ questioned claimant about RR's reported swearing, claimant responded that sometimes "he would use the 'f' word...he would use the word 'dick.' Like he'd refer to people as being a dick...he would even refer to himself in that way, such as, 'I don't want to be a dick.'" Transcript (July 9, 2018 hearing) at 35. When the ALJ asked about his use of the "f" word and why she did not mention that in the first hearing, she explained that RR had only occasionally used the "f" word when speaking to her to emphasize whatever it is was yelling about, and it didn't stand out to her as much as the word "dick." Transcript (July 9, 2018 hearing) at 35-36. Although claimant was dissatisfied with her supervisor's manner of communicating with her and considered it hostile, the record does not show claimant's supervisor called claimant names using foul language or even at all, ever threatened claimant with physical harm or did anything more than occasionally raise his voice at her, which is not uncommon in work settings.

Claimant further testified that despite what had previously occurred, but for her conversation with RR on February 2, 2018, she would not have quit when she did, and in fact never had any intention to quit. Audio Record (May 9, 2018 hearing) at 20:50 to 21:45. Thus, it was her conversation with him that day that triggered claimant's decision to do so. Although claimant considered his comments and attitude during their meeting to be insulting, disrespectful and hostile, viewing her description of that meeting to KB in Exhibit 1, it appears that claimant was primarily offended by RR's minimization of her contributions to the success of the kitchen and his occasional usurpation of her perceived role as the final decision-maker concerning kitchen-related issues. Viewed objectively, claimant failed to show that RR's conduct toward her during the February 2, 2018 meeting was personally abusive within the meaning of *McPherson*.

Even though the record fails to show that RR's conduct toward claimant constituted a hostile work environment, it does indicate that his method of communication toward her constituted a significant problem, recognized by the employer. After its personal training sessions with RR concerning employee communications apparently failed, the employer offered to take the additional step of mediating a meeting between claimant and the general manager in an apparent attempt to salvage their working relationship, a meeting claimant summarily rejected. Claimant failed to show that accepting that objectively reasonable offer would have been futile and that no reasonable and prudent food and beverage manager, of normal sensitivity and exercising ordinary common sense in her circumstances, would conclude, before having taken the employer up on its offer, that she had no reasonable alternative but to quit work.

Claimant voluntarily left work without good cause and is disqualified from receiving unemployment insurance benefits until she has earned at least four times her weekly benefit amount from work in subject employment.

DECISION: Order No. 18-UI-112800 is affirmed.

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

DATE of Service: August 16, 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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