

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0729

Affirmed
Disqualification

PROCEDURAL HISTORY: On June 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 122109). Claimant filed a timely request for hearing. On July 9, 2018, ALJ Murdock conducted a hearing, and on July 12, 2018 issued Order No. 18-UI-113009, affirming the Department's decision. On July 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which, in part, contended that the hearing was unfair because she was not prepared for the "aggressive questioning" that took place in it and had she known in advance of it, she would have had her attorney present. At hearing, however, claimant stated only that she would have liked her attorney present because "I didn't know it was gonna be this in depth." Transcript at 32. It does not appear to EAB that the questioning of claimant by the ALJ or the employer's representative was fairly characterized as aggressive, although it did try to focus claimant's testimony on the specific facts underlying some of the conclusions she asserted. EAB has reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties a reasonable opportunity for a fair hearing as required by ORS 657.270(3) and OAR 471-040-002(4) (August 1, 2004). The proceedings in which claimant was not represented by an attorney were not unfair to her for that reason.

Claimant's written argument contained information that was not part of the hearing record. However, claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information that she now seeks to present by way of her written argument during the hearing. Under OAR 471-041-0090 (October 29, 2006), EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Albertina Kerr Centers Inc. employed claimant as a caregiver from July 5, 2016 until May 12, 2018.

(2) Around mid-July 2017, a nurse told claimant that claimant was “too dumb to be delegated” the task of inserting a feeding tube in a resident. Transcript at 11, 12. By making this comment, claimant thought the nurse was discriminating against her based on her age. Claimant went to the employer’s assistant executive director and complained about the alleged ageism of the nurse.

(3) On July 28, 2017, the same nurse that made the allegedly ageist comment to claimant, told claimant that she was required to submit to a drug test based on reasonable suspicion. The employer followed the protocols in its drug policy before requiring claimant to take a drug test. The nurse told claimant that she was being tested because she had not been “acting right,” “wasn’t sitting still” and “wasn’t acting [like] myself.” Transcript at 9, 10. Claimant gave a urine sample for testing and was not allowed to work while the sample was being evaluated. Around the time claimant was required to give the urine sample, claimant’s supervisor told claimant that she and not the nurse had first brought up administering a drug test to claimant. Claimant did not believe her supervisor and thought that, for some reason, she was not telling her the truth. Subsequently, the drug test that claimant was given was determined to be negative for drugs and the employer paid for the shifts that she did not work while the test was being processed.

(4) Sometime around the fall of 2017, claimant was ill due to arthritis. When claimant would call in to the supervisor to request days off because she was experiencing arthritis, claimant perceived that the supervisor was pressuring her to report for work despite her condition when the supervisor would state, “[W]e need you there.” Transcript at 5. Around this same time, the supervisor told claimant that she was going to be “written up due to my excessive absences.” Transcript at 8. Subsequently, claimant applied for and the employer approved a medical leave that retroactively covered claimant’s absences for arthritis during this time. The employer never issued a write-up to claimant for her absences.

(5) Around October 2017, claimant consulted with an attorney about what she thought should not have been happening in the workplace. Sometime around approximately November 2018, claimant filed a lawsuit against the employer for age discrimination. Claimant continued working for the employer despite the lawsuit. Claimant’s attorney had advised her after the filing of the lawsuit, “[J]ust go to work and be a team player.” Transcript at 18.

(6) In approximately January 2018, claimant’s physician authorized light duty work for claimant due to a physical limitation. However, the employer was unable to accommodate claimant because it did not have any light duty work available. Claimant thought the employer’s failure to accommodate her was unfair.

(7) After January 2018, no incidents occurred between the employer and claimant to which claimant objected. However, claimant did not feel comfortable at work after her lawsuit was filed and she did not trust her supervisor or other members of management. After the lawsuit was filed, “[E]verybody pretty much left me alone. There was a lot of hush-hush talk about me.” Transcript at 18. However, claimant continued to report for work.

(8) In May 2018, claimant’s attorney and the employer negotiated a settlement of claimant’s lawsuit. As part of the settlement, the employer paid claimant approximately \$2,400 and claimant agreed to resign

from work effective May 12, 2018. Had claimant not accepted the settlement and agreed to resign, continuing work was available to her. Claimant entered into the settlement because she could not afford the cost of an ongoing lawsuit. Claimant agreed to resign because she did not think she had been treated fairly in the workplace, did not feel comfortable and did not trust the employer.

(9) On May 12, 2018, 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) (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.

While claimant might have felt uncomfortable continuing to work after her lawsuit was filed and no longer trusted the employer’s management, she did not cite any objectionable interactions that occurred in the workplace after January 2018, five months before deciding to leave. It appears that the proximate cause for claimant’s decision to accept the settlement agreement and leave work was her discomfort in continuing to work and her lack of trust in the employer’s management. The discomfort and lack of trust that claimant experienced, as described by her, are devoid of factors that would constitute grave reasons for leaving work. Claimant did not describe any significant harms or substantially damaging impacts that she sustained from continuing to work after the filing of the lawsuit. Although claimant left work, in part, because of a term in the settlement agreement, claimant’s testimony at hearing was that she did not accept the settlement agreement and leave work due that agreement’s financial incentives, but because of the conditions under which she was working. Transcript at 26-27. Accordingly, the proper focus to determine whether claimant had good cause to leave work was the working conditions at the time she decided to do so.

Claimant did not show that grave reasons motivated her to leave work, and that she had good cause for doing so. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-113009 is affirmed.

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

DATE of Service: August 17, 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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