

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0775

Reversed
No Disqualification

PROCEDURAL HISTORY: On June 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 151320). Claimant filed a timely request for hearing. On July 19, 2018, ALJ Amesbury conducted a hearing at which the employer did not appear, and on July 20, 2018, issued Order No. 18-UI-113580, affirming the Department's decision. On August 6, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not presented during the hearing. Claimant did not explain why he did not offer this information at the hearing or otherwise show as required by OAR 471-041-0090(2) (October 29, 2006) that he was prevented from doing so by factors or circumstances beyond his reasonable control. For this reason, EAB did not consider the new information that claimant sought to present when reaching this decision.

FINDINGS OF FACT: (1) Brian's Pourhouse employed claimant as a bartender and server from March 20, 2015 until April 24, 2018. As a condition of his employment, claimant had an alcohol server's permit issued by the Oregon Liquor Control Commission (OLCC).

(2) In November 2017, the employer was sold and a new owner assumed control. The new owner and his girlfriend exercised supervisory control over the employer's day-to-day operations and its staff, including claimant. Before the employer was sold, claimant perceived the work environment as positive and supportive. After the sale, claimant perceived the work environment as hostile.

(3) The owner's girlfriend was often in the restaurant and disrupted it. She yelled at employees. At least once, claimant heard that the new owner had been physically aggressive toward one of his coworkers.

(4) When the owner's girlfriend was in the restaurant she often drank to excess and became intoxicated. The owner sometimes also drank to excess. If claimant thought the girlfriend was intoxicated and tried to discourage her from further drinking or expressed an intention to stop serving alcohol to her, she might move from the bar to a table where a server would continue to bring her alcohol. Sometimes, the

girlfriend would not move, but would demand that claimant continue serving alcohol to her. Claimant felt pressured by the girlfriend's insistence and fearful of the consequences to his employment if he stopped serving her alcohol. As a result, claimant sometimes brought the girlfriend alcoholic drinks when he thought she was intoxicated. Claimant became concerned that the girlfriend would harm herself or others when driving home intoxicated. Because the girlfriend often brought her minor children to the workplace, claimant was also concerned that the children would be harmed if the girlfriend drove them home in an intoxicated condition. Claimant thought he could be legally responsible for any damages or injuries the girlfriend caused in an intoxicated state if he had served alcohol to her in the restaurant when she was visibly intoxicated.

(5) On April 24, 2018, claimant was working in the early evening when the girlfriend arrived at the restaurant with her child. The girlfriend visited some guests at a table and began drinking alcoholic beverages. The girlfriend then came up to claimant at the bar and yelled at him for having served the wrong drink to one of the guests at the table. Claimant told the girlfriend he would make a new drink for the guest after finishing the drinks he was in the process of preparing. The girlfriend became very angry and yelled very loudly at claimant in front of restaurant guests that he was "blow[ing] his role." Audio at ~32:15. The girlfriend then returned to her table and continued to drink. The girlfriend began talking very loudly, burping and complaining about many things. The language she used was foul. Some restaurant guests complained about the girlfriend's disruptive behavior. The chef came out from the kitchen to see what was happening in the restaurant because she was concerned by the noise. At some point, the girlfriend began sobbing loudly at the table where she was sitting. Some guests came up to claimant and a coworker and expressed concern about the girlfriend.

(6) Later on April 24, 2018, the girlfriend retrieved her child from the restaurant office, started walking from the restaurant, but stumbled in the doorway. Claimant and the coworker spoke to the chef and stated they were concerned that the girlfriend was intoxicated and intended to drive home with her child. Shortly thereafter the owner arrived at the restaurant and the chef spoke to him about claimant's and other staff's concerns about the girlfriend's condition. The girlfriend then returned to the restaurant and told claimant that she and the owner wanted to see him in the office. Once in the office, the girlfriend yelled very loudly at claimant and accused him of overcharging her for the alcoholic drinks she had consumed that evening as well as for the food for her and her child. Ultimately, claimant retrieved the receipts for the girlfriend's food and drinks that evening and she seemed satisfied that claimant had not overcharged her. After the meeting ended, the girlfriend left the restaurant and drove home despite claimant's belief that she was intoxicated.

(7) After claimant's shift ended on April 24, 2018, he decided not to continue working for the employer. Claimant stopped reporting for work because he thought the work atmosphere was hostile, he disliked being pressured to serve alcoholic beverages to the girlfriend when she was visibly intoxicated, and he was concerned that the girlfriend would drive home after becoming intoxicated at the restaurant and harm herself, her children or others.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with good cause.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

In Order No. 18-UI-113850, the ALJ concluded that claimant left work without good cause. The ALJ reasoned that claimant did not show that his situation was grave because, among other things, “[h]is concerns about liability for the intoxicated acts of his manager were theoretical, and he did not describe a situation where he was actually exposed to liability, because he was able to comply with the laws governing the service of alcohol.” Order No 18-UI-113850 at 3. We disagree.

Claimant described a work situation in which the owner’s girlfriend repeatedly insisted that he serve her alcohol despite his awareness that she was intoxicated. ORS 471.315(1)(a)(H) and ORS 471.412(1) make it unlawful for someone like claimant who serves alcoholic beverages on behalf of an OLCC licensee to allow a visibly intoxicated person to consume alcohol on the licensee’s premises. While claimant theoretically could have refused to continue to serve the girlfriend alcohol after she became visibly intoxicated, it remains that the girlfriend, on behalf of the employer, was insisting that claimant violate the law. While claimant’s concern that he might be held legally responsible for the harm the girlfriend caused to herself or others if she had an accident driving after she became intoxicated was “theoretical,” claimant’s testimony viewed as a whole suggests that his concern was not merely about being held legally or financially responsible, but also about being pressured to act in a manner that ultimately exposed others to risks of serious harm by virtue of the girlfriend’s behavior while intoxicated. It appears to us that no reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would continue working for an employer who pressed him to act unlawfully and expose others to serious risks. On this record, claimant showed good cause for leaving work when he did.

Claimant voluntarily left work with good cause. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Order No. 18-UI-113580 is set aside, as outlined above.

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

DATE of Service: September 7, 2018

NOTE: This decision reverses an order that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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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