

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0856

Reversed
No Disqualification

PROCEDURAL HISTORY: On May 15, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #104055). Claimant filed a timely request for hearing. On June 20, 2018, ALJ S. Lee conducted a hearing, which was continued to allow a complete presentation of evidence. On July 16, 2018, the ALJ convened a continued hearing at which claimant's request for an additional continuance was allowed. On August 2, 2018, the ALJ conducted a continued hearing at which claimant did not appear and on August 13, 2018 issued Order No. 18-UI-114849, affirming the Department's decision. On September 4, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she requested a reopening of the hearing to allow her the opportunity to participate fully since she did not appear at the August 2, 2018 continuation of the hearing. EAB construed claimant's request as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering it shows that the party was prevented by factors or circumstances beyond the party's reasonable control from presenting that information at hearing. As an explanation for missing the August 2 hearing, claimant stated that "the hearing date passed, and I did not realize it until the next day August 3rd, 2018." EAB infers that claimant likely did not appear on August 2 because she failed to keep track of her schedule. Because oversights of the sort that led to claimant missing the continuation of the hearing are considered to be within a party's reasonable control to avoid, claimant's request to have EAB consider its additional evidence must be denied.

Claimant's argument also contended in essence that the ALJ erred in Order No. 18-UI-114849 by failing to consider that she left work, at least in part, to avoid domestic violence. However, because EAB has found in claimant's favor on other grounds, we need not, and do not, decide whether it was error for the ALJ not to have considered the issues of domestic violence raised by claimant.

EVIDENTIARY MATTER: Although the ALJ stated in Order No. 18-UI-114848 at 1 that no exhibits were offered or admitted into evidence during the hearing, the employer did, in fact, offer Exhibit 1 and it was admitted. Transcript of August 2, 2018 Hearing at 20. EAB hereby corrects that misstatement.

FINDINGS OF FACT: (1) The Department of Human Services employed claimant from May 2, 2009 until April 16, 2018, last as an analyst in its disability determination section. Claimant worked first at the employer's office in Salem, Oregon.

(2) Sometime before 2017, claimant experienced domestic violence from a former partner and obtained a protective order against the partner. The employer was aware that claimant had been a victim of domestic violence.

(3) Sometime in 2017, claimant developed post-traumatic stress disorder (PTSD), anxiety and depression. Claimant's condition worsened when she experienced stress in the workplace. Claimant received treatment for these conditions from a physician in 2017 and 2018.

(4) By August 2017, claimant thought that some of her coworkers were acting with unexplained hostility toward her. Claimant also thought that some coworkers were for unknown reasons watching her, gossiping about her and making fun of her behind her back. On one occasion when a coworker bumped into claimant's shoulder, claimant thought the coworker had done deliberately. On another occasion when the same coworker was sitting in a chair behind claimant and the coworker's chair forcefully bumped claimant's chair as the coworker got up to leave, claimant thought that the coworker had intentionally rammed her chair into claimant's chair. Claimant considered contacting the police to report the coworker's action as a criminal assault. As time passed, claimant continued to think that coworkers "glared" at her, watched her and were talking about her during the workday. Transcript of June 20, 2018 Hearing (Transcript 1) at 31, 35. Based on her perception and interpretation of workplace incidents, claimant believed she was being harassed and bullied by her coworkers.

(5) In September 2017, claimant reported to a human resources representative that she felt unsafe, bullied and harassed at work. Claimant also told the representative that she had experienced domestic violence in the past. Claimant tried to tell the representative about the recent events in the workplace that she thought had contributed to her feeling unsafe, harassed and bullied. The representative thought that claimant's description of why she felt as she did was not clear, and that claimant did not identify the coworkers or specify in detail the events that gave rise to her feelings. The human resources representative arranged to have claimant moved to a desk that was some distance away from the coworkers that claimant perceived as being hostile toward her. The representative also discussed with claimant the possibility that she might want to take a leave of absence under the Family Medical Leave Act (FMLA). After that meeting, claimant continued to perceive hostility from her coworkers and to feel harassed and bullied.

(6) Sometime later, claimant told her manager that she thought some of her coworkers were harassing, bullying and acting with hostility toward her. Claimant's manager told claimant that she did not think the coworkers were doing what claimant thought. On October 18, 2018, claimant met with a human resources representative to discuss a FMLA leave from work due to claimant's reactions to the workplace. At that meeting, claimant brought up new concerns about harassment from coworkers and told the representative that coworkers were asking her inappropriate questions and making faces at her.

However, the representative told claimant that the employer could not investigate her claims of harassment unless she was able to provide more specific information about the incidents that she contended were harassment.

(7) Sometime around early November 2017, claimant submitted paperwork and a physician's certification for a FMLA leave. At that time, claimant was "having a lot of difficulty functioning." Transcript 1 at 7. On November 15, 2017, the employer approved a FMLA leave for claimant from November 8, 2017 through December 31, 2017. The leave was based on PTSD, anxiety and depression. Claimant's FMLA leave was later extended through January 31, 2018.

(8) In January 2018, claimant and the employer were attempting to determine what steps the employer might take to alleviate claimant's feeling that she would not be safe in the workplace when she returned to work. As of February 1, 2018, claimant's FMLA leave was exhausted. The employer approved a leave for claimant through February 28, 2018 under the Americans with Disabilities Act (ADA). On February 14, 2018, claimant's physician advised the employer that claimant could return to work, but not "[i]n the current environment with coworkers trying to find out about her past. Triggers significant stress." Exhibit 1 at 22.

(9) On March 5, 2018, the employer notified claimant that the information provided by her physician was not sufficient to determine reasonable accommodations under ADA when claimant returned to work. The employer extended claimant's ADA leave pending the receipt of further information and further discussion of claimant's workplace needs.

(10) On March 15 2018, the employer notified claimant that a disability analyst position had opened in its Portland, Oregon office. Claimant accepted the position and began work on April 1, 2018.

(11) During the first week after her return to work, claimant went to the employer's offices in Salem for training. In Salem, claimant became upset because she thought employees were gossiping about her former coworkers and mimicking her behaviors in mockery. Transcript 1 at 20, 21. While in Salem, claimant observed a physician that she had previously worked with and thought he "glared" at her from the parking lot of the Salem office. Transcript 1 at 21.

(12) During the second week of claimant's employment, claimant observed that her computer at the Portland office had not been set up, she had no access to the employer's electronic database, and her phone was not set up. Claimant believed that these actions were intended to harass her. Claimant also thought that her new coworkers in Portland were talking about her behind her back as her former coworkers in Salem had done, although claimant could not understand what her new coworkers in Portland were saying about her. Transcript 1 at 24. Claimant also thought the new coworkers in Portland were "smirking" at her. Transcript 1 at 23. Claimant thought the harassment and bullying she experienced in Salem was continuing in Portland.

(13) By approximately the end of the second week in April 2018, claimant had begun to experience migraine headaches and blurred vision. Claimant was unable to concentrate or attend to her job because of her perceptions of her coworkers and "everything going on." Transcript 1 at 27.

(14) On Monday, April 16, 2018, claimant notified the employer that she was leaving work effective immediately. Claimant decided to leave the work because she believed that the new workplace “was starting to trigger my symptoms again.” Transcript 1 at 27.

CONCLUSIONS AND REASONS: Claimant voluntarily left work with 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). Claimant testified that she had and was receiving medical treatment for PTSD, anxiety and depression, all of which appear to be permanent or long-term “physical or mental impairments” as defined at 29 CFR §1630.2(h). A claimant with those impairments who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such impairment would have continued to work for her employer for an additional period of time.

In Order No. 18-UI-114849, while the ALJ found, as fact, that claimant suffered from the long-term impairments of PTSD, anxiety and depression, she concluded that claimant did not show good cause for leaving work. Order No. 18-UI-114849 at 5. The ALJ reasoned that since the employer had made “multiple accommodations to help claimant feel safe and comfortable in her work environment” and claimant’s complaints about the Portland workplace were “not sufficient [for the ALJ] to determine that she was being harassed at her new office,” a reasonable and prudent person with claimant’s impairments “would have given her new assignment longer than two weeks.” Order No.18-UI-114849 at 7. The ALJ further reasoned that claimant quit without having pursued the reasonable alternative of “using that time [the two weeks in the Portland workplace] to establish a working relationship with her new colleagues.” Order No. 18-UI-114849 at 7. We disagree.

Based on claimant’s testimony at hearing, it appears that she sincerely thought that her coworkers in Salem and later in Portland were targeting her, making fun of her, talking about her behind her back and engaging in various behaviors that she perceived as harassing and bullying. While the employer’s witness at hearing testified that claimant had not clearly and sufficiently articulated the bases for her perceptions to allow the employer to conduct an investigation, the witness did not suggest that claimant was fabricating her perceptions of workplace incidents, or the depth of her emotional reactions to those perceptions, whether or not they were objectively accurate. Transcript of August 2, 2018 hearing at 8-10. Although the employer tried to make accommodations that would allay claimant’s negative perceptions of and reactions the workplace by moving her to the Portland office, those accommodations were not successful inasmuch as claimant experienced the Portland office to be as damaging as the Salem office and for the same reasons. The standard for determining whether the situation of a claimant with a permanent or long-term impairment is grave is not based on the efforts the employer made to alleviate claimant’s undesirable reaction to the workplace or the objective accuracy of claimant’s perceptions, but whether a reasonable and prudent person with *characteristics and qualities of claimant* would have perceived his or her circumstance as grave despite the employer’s efforts. On this record, there is insufficient evidence to show that a reasonable and prudent person with the types of PTSD,

depression and anxiety that affected claimant, and presumably contributed to her perceptions, would have considered the gravity in her situation to have been abated by her assignment to the Portland office. A reasonable and prudent person with the same impairments would have decided to leave work when she did based on her perceptions and belief that the harassment and bullying she had perceived in the Salem office was continuing in the Portland office.

Claimant showed good cause for leaving work when she did. Claimant is not disqualified from receiving unemployment benefits.

DECISION: Order No. 18-UI-114849 is set aside, as outlined above.

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

DATE of Service: October 9, 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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