

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0885

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 10, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct within 15 days of a planned voluntary leaving without good cause (decision # 124454). Claimant filed a timely request for hearing. On September 5, 2018, ALJ Janzen conducted a hearing, and on September 6, 2018 issued Order No. 18-UI-116131, concluding claimant voluntarily left work without good cause. On September 10, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond her reasonable control prevented her from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) AT-T Mobility Services LLC employed claimant as a retail sales consultant from July 4, 2014 until July 12, 2018.

(2) The employer had a progressive disciplinary policy. Except for serious breaches of the employer's policies, the employer did not discharge employees without proceeding through disciplinary stages. An employee's failure to perform to the employer's expectations was handled through the process of progressive discipline.

(3) In July 2017, claimant's mother died by suicide. Claimant's physician authorized a leave of absence for claimant of up to one year due to the stress, depression and anxiety that claimant experienced as result of her mother's death. The employer approved a leave of absence for claimant beginning in late July 2017. However, claimant was not receiving pay while on leave and felt that her managers were pressuring her to return to work. In September 2017, claimant returned to work.

(4) After returning to work, claimant was not performing as well as she had before going on leave. In April 2018, claimant requested and was allowed to transfer to a smaller, less busy store with lower sales quotas and performance expectations. While working at the smaller store, claimant perceived that the performance expectations of its management changed and became higher. Although claimant was meeting company-wide sales and performance standards, she did not feel she was meeting the more stringent standards of that store's management. On many occasions after she transferred, the manager and assistant manager of the store spoke to claimant about their expectations and told her that they wanted her to improve her performance. Claimant began to feel "targeted." Audio at ~14:04. Claimant thought she was "easily disposable." Audio at ~14:04.

(5) On June 21, 2018, claimant had a discussion with the area manager about leaving work to pursue a career in real estate. The area manager asked claimant when she thought she might be leaving work because she was "messing up [the area manager's] head count." Audio at ~27:28. Claimant interpreted that comment to mean that she was not performing to the level that the area manager desired, and that if she left work and was no longer an employee, the quotas that the area manager was required to meet would be lowered.

(6) On June 27, 2018, the assistant manager of the store discussed with claimant the store's performance expectations. The assistant manager told claimant that "you're on the list." Audio at ~16:20. Claimant interpreted his comments to mean that if she did not start performing as expected, the employer would initiate progressive disciplinary proceedings against her. Claimant had been told that if disciplinary proceedings were started she could be discharged within three months. Claimant felt she was being "pushed out." Audio at ~16:20.

(7) On June 28, 2018, claimant notified the employer that she leaving work in two weeks, on July 13, 2018. Claimant decided to leave work to avoid being discharged for unsatisfactory work performance. As of June 28, 2018, the employer had not begun formal disciplinary proceedings against claimant.

(8) On July 12, 2018, claimant reported for work and the employer had a final paycheck ready for her because July 12th was two weeks after June 28th, the date on which claimant resigned. Claimant did not protest or insist that she be allowed to work one more day, until July 13th.

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

While claimant gave two weeks' notice that she was leaving work on June 28th, the date she identified as her leaving date was July 13, which was two weeks and one day after she gave that notice. When claimant reported for work on July 12 she was confused about why the employer had her final check ready and did not expect her to work after that day. However, because claimant did not protest or demand to work until July 13 it appears that she acquiesced to the employer's interpretation of her resignation note that she intended her final day to be July 12. As such, claimant's work separation was a voluntarily leaving on July 12. See *J.R. Simplot Co. v Employment Division*, 102 Or App 523, 795 P2d 579 (1990).

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 depression and anxiety, which are assumed to be a permanent or long-term “physical or mental impairment” 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 impairments would have continued to work for her employer for an additional period of time.

Claimant was very clear at the hearing that she left work to avoid being discharged due to not meeting the employer’s performance expectations and her belief that she would be discharged as a result. Audio at ~14:04, ~15:35, ~15:56. Claimant did not contend that she left work as a result her impairments or symptoms arising from them. The focus of the inquiry into whether claimant had good cause for leaving work is whether a reasonable and prudent person with anxiety and depression would have considered the prospect of being discharged to constitute a situation of gravity on the facts in the record.

The basis for the discharge that claimant sought to avoid, failure to satisfactorily perform, would not be for misconduct on the facts that claimant presented. *See* OAR 471-030-0038(3)(a) (January 11, 2018) (misconduct is based on showing violations of the employer’s standards that arise from willful or wantonly negligent behavior). In *McDowell v. Employment Department*, 348 Or 605, 236 P3d 722 (2009) the Supreme Court addressed the circumstances under which an employer’s threat to discharge a claimant, not for misconduct, may constitute good cause for leaving work. In holding that claimant left work for good cause, the court in *McDowell* noted that claimant’s discharge was both inevitable and imminent as of the time of the voluntary leaving. Here, claimant agreed that, as of when she quit, no employer representative had explicitly told her that she was going to be discharged or when such a discharge was going to happen. Audio at ~17:18. Claimant also did not challenge the testimony of the employer’s witness that the employer had not begun the formally disciplinary proceedings needed before claimant could be discharged pursuant to the employer’s policies. Audio at ~9:30, ~34:39, ~40:00. Claimant understood that if such proceedings were initiated and she did not improve her performance, the earliest she could be discharged would be three months after they were commenced. Audio at ~17:43. Claimant did not suggest that if her performance improved after the initiation of disciplinary proceedings, she would still be discharged. The record does not establish that claimant’s discharge was imminent or necessarily inevitable, but only that her sales performance might lead to the start of the progressive disciplinary process.

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

DECISION: Order No. 18-UI-116131 is affirmed.

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

DATE of Service: October 12, 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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