

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1017

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 7, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant intended to voluntarily leave work without good cause on July 31, 2018, but was eligible to receive benefits until July 28, 2018 because the employer discharged her not for misconduct on July 16, 2018 (decision # 143659). Claimant filed a timely request for hearing. On September 28, 2018 ALJ Schmidt conducted a hearing, and on October 5, 2018 issued Order No. 18-UI-117811, affirming the Department's decision. On October 24, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument. However, claimant failed to certify that she provided a copy of that argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond her reasonable control prevented her from offering that information during the hearing as required by OAR 471-041-0090 (October 29, 2006). For these reasons, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Polk County employed claimant as an office specialist working in the community corrections department from October 1, 2018 until July 16, 2018. Claimant was a person of Hispanic heritage.

(2) Claimant had high blood pressure that was aggravated by stress.

(3) Claimant and her supervisor, the community corrections office manager, did not get along and had a poor working relationship. Claimant also did not get along with the community service supervisor and had a poor working relationship with him. Throughout her employment, claimant felt that she was "constantly nitpick[ed]" by the office manager and that the community service supervisor treated her unfairly. Transcript at 14.

(4) Beginning around 2016 and continuing throughout her employment, claimant had several negative interactions with the community corrections office manager. On one occasion, claimant could not locate her notary stamp and was told that the office manager had taken it because claimant had left it out on her desk unattended. When claimant spoke with the office manager about her stamp, the office manager told claimant that if she left it out again, the office manager would not give it back to her and she would need to purchase a new stamp. On many occasions, the office manager criticized claimant for making minor accounting errors and other mistakes when inputting information in the employer's databases. Although employees other than claimant had responsibility for accounting tasks and inputting information, claimant thought that the office manager had unfairly singled her out for blame.

(5) In approximately 2016 and 2017, claimant had several negative interactions with the community service supervisor. On one occasion, the community service supervisor used foul language that claimant thought was directed at her and accused her of trying to run his car off the road. On another occasion, the community service supervisor noticed that claimant had failed to issue a receipt to an offender for a payment that the offender had made and, when the supervisor mentioned it to claimant, claimant interpreted his comments as accusing her of stealing the money that the offender had paid.

(6) On February 28, 2018 and March 13, 2018 claimant met with the employer's administrative services director to discuss concerns she had about the workplace and the treatment she received from the office manager and the community service supervisor. Claimant informed the director of the 2016-2017 incidents with the community service supervisor and several incidents involving the office manager. The administrative services director asked claimant to gather additional information about at least one of the incidents she had described involving the community service supervisor. On March 27, 2018, claimant again met with the administrative services director to further discuss her unhappiness in the workplace. Claimant was accompanied by a union representative and expressed that she was considering quitting work. The administrative services director stated that the employer generally needed to receive two weeks' notice prior to leaving to give a favorable job reference. Claimant decided not to resign. As a result of these meetings, the administrative services director informed the community corrections director of claimant's concerns. In addition, the employer moved the office of the community service supervisor so that it was no longer near claimant's office to limit contact between claimant and the community service supervisor in an attempt to ease claimant's discomfort in dealing with him.

(7) In April 2018, the community corrections director and the office manager gave claimant her annual performance evaluation. Claimant noticed that the director had with her a folder that was compiled by the office manager and set out in detail many alleged errors that claimant had made. Claimant thought that the errors were all minor. Claimant was concerned that the community corrections director would believe the office manager and the community service supervisor about the quality of her work performance. The community corrections director told claimant that her performance would be evaluated again in October 2018.

(8) In approximately June 2018, the office manager mentioned to claimant that, after counting the money that the employer had received from offenders, it appeared to her that some money was missing. When claimant tried to explain what had happened, the office manager did not listen. Also in June, the office manager pointed out to claimant that she had failed to mark some currency that the employer had received from offenders when it was the employer's practice to mark that currency. When claimant tried to tell the office manager that employees other than her were also responsible for marking the currency,

and the error leaving the currency unmarked could have been attributable to them and not her, the office manager did not listen to her.

(9) Before July 12, 2018, claimant considered the reasons why the office manager and the community services supervisor were treating her in ways that she thought were unfair. Claimant thought it might be because she was Hispanic and they were Caucasian.

(10) Before July 12, 2018, claimant's physician did not advise her that she needed to quit work for health reasons. Claimant's physician did tell her that to control her blood pressure, she should try to limit the stress to which she was subjected.

(11) On July 12, 2018, claimant notified the community corrections director that she was going to resign from work effective July 31, 2018. Claimant decided to leave work because she felt she could no longer work with the office manager and she was tired of the office manager's criticisms of her.

(12) On July 16, 2018, claimant met with the administrative services director to determine if she could transfer to a different department rather than resign. The administrative services director told claimant the employer had no other available office specialist positions. Claimant began to cry and the director said, "How about we make today your last, um, day? * * * *[L]et's go get your stuff." Transcript at 18. Claimant thought the director had fired her. Claimant retrieved her personal belongings from the workplace and left. Thereafter, claimant did not return to the workplace.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause. However, claimant is entitled to receive benefits for the week of July 15, 2018 through July 28, 2018.

Although claimant notified the employer on July 12, 2018 that she was leaving work effective July 31, 2018, she did not work after July 16, 2018. ORS 657.176(8) provides that when an individual has notified an employer that the individual will leave work on a specific date, the planned leaving would be for reasons that do not constitute good cause and the employer discharged the individual not for misconduct no more than 15 days prior to the planned voluntary leaving, the work separation should be adjudicated as if the discharge had not occurred and the planned voluntary leaving had occurred. However, the individual shall be eligible for benefits for the period including the week in which the actual discharge occurred through the week prior to the week of the planned voluntary leaving date. To determine whether ORS 657.176(8) is applicable to claimant's work separation, we must consider whether the employer discharged claimant on July 16 and, if so, whether that discharge was or was not for misconduct and whether claimant's planned voluntary leaving on July 31 would or would not have been for good cause. We turn first to the events of July 16.

The July 16 Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (January 11, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

At hearing, claimant's testimony that she wanted to work through July 31 was not disputed, and neither party contended that she indicated otherwise during her July 16 meeting with the administrative services

director. While claimant did not contend that the administrative services director told her she was discharged, fired or the like on July 16, the administrative services director did peremptorily tell claimant that the employer was going to consider July 16 as her last day and told her to gather together and take her personal belongings from the workplace. That claimant thought the administrative services director was discharging her by such a unilateral statement was a reasonable inference, particularly since he did not tell claimant that the employer was willing to allow her to work until July 31 if she so wished and did not ask claimant if she agreed to accelerate the effective date of her leaving from July 31 to July 16. On this record, claimant was discharged on July 16. Since the date of that discharge was 15 days before claimant's planned voluntary leaving date of July 31, ORS 657.176(8) remains potentially applicable to claimant's work separation.

Misconduct. ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (January 11, 2018) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer carries the burden to show that it discharged claimant for misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the administrative services director testified that he brought up July 16 as claimant's last day because "sometimes people stick it out for that two weeks [of a notice period] and it just makes the situation deteriorate." Transcript at 8. However, it was not a willful or wantonly negligent violation of the employer's reasonable standards for claimant to have announced she planned to leave to leave work. Nor did the employer show that it otherwise discharged claimant for any willful or wantonly negligent violations of its standards or that the "deterioration" the administrative services director referred to was or would have been caused by claimant's willful or wantonly negligent behavior. Claimant's discharge on July 16 was not shown to have been for misconduct. Since claimant was discharged not for misconduct, ORS 657.176(8) remains potentially applicable to claimant's work separation.

Voluntary Leaving. 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 had high blood pressure, which presumably is a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with that impairment 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.

With respect to claimant's high blood pressure, claimant did not cite it as a reason that she left work when she did. Other than the fact that she had hypertension, she did not show how, if at all, it factored into her decision to leave work or even that it caused an objectively grave situation for claimant. On this record there is insufficient evidence showing or tending to show that health reasons were a proximate

cause of claimant's decision to leave work or that they were of sufficient gravity to necessitate that claimant leave work.

While claimant mentioned during the hearing that she thought the office manager and the community service supervisor might have treated her poorly and unfairly because she was of Hispanic origin, she did not connect any objectionable behaviors on the part of either to overt or covert national origin discrimination other than generally asserting that this could be so Transcript at 15, 27, 34. Claimant did not show any circumstantial factors that suggested or tended to suggest that the behaviors of either the office manager or the community service supervisor were motivated in whole or in part, directly or indirectly, by national origin or other forms of discrimination. In addition, it does not appear that claimant complained to the administrative services director that she believed she was being discriminated against by the office manager and the community service supervisor as she would have been expected to do when she raised with him the many complaints she had against both on February 28, March 13 and March 27. On this record there is insufficient evidence showing or tending to show that national origin discrimination against claimant by the office manager or the community service supervisor had occurred or was a proximate cause of claimant's decision to leave work.

With respect to the "nitpicking" criticisms of claimant by the office manager, claimant did not show that they constituted a situation of gravity for her. Many employees are supervised by individuals who may on occasion focus on minor or trivial details and criticize subordinates for lacking attention to detail and most employees do not quit over such supervision unless it is accompanied by other grave factors. Claimant did not present concrete and specific evidence from which it might be inferred that she was working in the type of objectively abusive, hostile or oppressive work environment that has previously been found good cause for leaving work. *See McPherson v. Employment Division*, 285 Or 541,557, 591 P2d 1381 (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). Nor did claimant present evidence as to any concrete harm she sustained from the behaviors of the office manager and the community services supervisor that she considered offensive. Finally, claimant did not present evidence from which it might reasonably be inferred that her meetings with the administrative services director, his contacts with the community corrections director about claimant's concerns and the steps taken to address those concerns had been or would be futile to address and rectify those concerns. On this record, there was insufficient evidence to establish that claimant had good cause for leaving work when she did and that there were no reasonable alternatives to that leaving.

Because claimant did not have good cause for her July 31 planned leaving, but she was discharged not for misconduct on July 16, which was not more than 15 days before her planned leaving, claimant is entitled to receive benefits for the weeks of July 15, 2018 through July 28, 2018 (weeks 29-18 and 30-18). Beginning July 29, 2018 (week 31-18), claimant is disqualified from benefits based on this work separation.

DECISION: Order No. 18-UI-117811 is affirmed.

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

DATE of Service: November 27, 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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