

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-1022

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 12, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83020). Claimant filed a timely request for hearing. On October 11, 2018, ALJ Murdock conducted a hearing, and on October 16, 2018 issued Order No. 18-UI-118220, affirming the Department's decision. On October 26, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument but failed to certify that she provided a copy of it 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) The Children's Clinic PC employed claimant from August 20, 2001 until August 9, 2018, last as a receptionist. Claimant worked principally at a clinic the employer operated in Tualatin, Oregon, but also worked two to four days per month covering for the regular receptionist at a clinic the employer operated in Newberg, Oregon.

(2) In early 2018, the employer authorized an intermittent leave for claimant of one or two days per week under the federal Family Medical Leave Act (FMLA) for "personal reasons." Audio at ~6:19.

(3) Sometime before July 2018, the regular receptionist in the Newberg clinic trained claimant in the duties claimant was expected to perform when providing coverage in that clinic. The regular receptionist told claimant that she did not need to handle some of the usual reception duties when she was in Newberg, and that the regular receptionist would perform them when returned to work.

(4) Sometime before July 2018, the employer had a new phone system installed in the Tualatin clinic. The phone system did not employ actual telephones, but instead routed incoming calls through

computers. Claimant and the employer's other receptionists were expected to determine if the employer had incoming calls by monitoring a software tool installed on their computers that queued up all calls in the order received. Claimant experienced difficulty using the software tool to observe and monitor the incoming calls in the queue while simultaneously trying to perform other work on her computer, which sometimes resulted in callers spending prolonged periods of time waiting in the queue for their calls to be answered. Employees other than claimant also had ongoing problems using the new phone system. Sometime around late July 2018, claimant spoke with a person in the employer's IT department and he told claimant that other of the employer's clinics also had problems with the new phone system and that the problems appeared to resolve after actual telephones were installed.

(5) On July 30, 2018, the regular receptionist at the Newberg clinic received complaints from the parents of two patients about claimant's recent treatment of them, which they stated was rude and unprofessional. On July 31, 2018, the regular receptionist received another complaint from a parent about claimant's recent rude treatment of that parent. The regular receptionist referred the complaining parents to the employer's director of operations, contacted the director of operations about the complaints and informed the director of how to reach the parents. The director of operations spoke with the parents to obtain more information. The parents described claimant when identifying the employee who was the subject of their complaints.

(6) On August 3, 2018, the director of operations met with claimant and gave her a corrective action. The corrective action was based on the complaints of the three parents that claimant had been rude and unprofessional toward them. It was also based on claimant's failure to perform all work duties when she was at the Newberg clinic. It was further based on claimant not adequately monitoring the queue of incoming phone calls and failing to answer queued up calls in a timely manner. Claimant told the director of operations that she disagreed that she had mistreated the three parents, did not think that one of the three complaining parents had a recent appointment at the clinic, and thought the complaints were "set up" or fabricated. Audio at ~8:06. After claimant told the director that the regular receptionist in the Newberg clinic had stated to her that she did not need to perform all her regular reception duties, the director amended the corrective action to remove certain listed deficiencies in performing duties in Newberg. However, the director informed claimant that she needed to perform all regular reception duties in the Newberg clinic if she provided coverage for periods of more than one day since the regular receptionist would not be available to complete them in a timely fashion. Claimant also told the director that she was not able to monitor the queue of incoming calls adequately using the computer software tool, but the director indicated to claimant that others were able to do so and she was not holding claimant to a higher standard than she held those employees. Claimant was very upset about receiving the corrective action.

(7) At claimant's request, the director of operations and the office manager met with claimant on August 9, 2018 to continue discussing the corrective action. Claimant was concerned that due to having received the corrective action, the yearly bonus she was otherwise scheduled to receive in August would be negatively impacted. Claimant also thought many of the alleged performance deficiencies in the corrective action had been fabricated by the regular receptionist in the Newberg clinic and were untrue. Claimant was scheduled to work at the clinic in Newberg for the next two weeks because the regular receptionist would be away. Claimant was "very uncomfortable" about working in the Newberg clinic. Audio at ~49:02. That day, claimant told the director of operations that she did not want to work at the Newberg clinic. The director told claimant it was not possible to immediately accommodate that request

because no other employees were available to provide coverage for the regular Newberg receptionist during the next two weeks, although not working in Newberg after that was an option the director would consider. Claimant told the director that she would quit rather than perform receptionist work at the Newberg clinic. The director asked claimant if that was her final decision and claimant stated, "Yes, I quit." Audio at ~37:50. Claimant quit work as "kind of an impulse thing." Audio at ~20:50. On August 9, 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 generally referred at hearing to stress she experienced when working for the employer, and to the fact she was on an intermittent FMLA leave at the time she decided to leave work, the preponderance of the evidence did not show that claimant had a permanent or long-term impairment that would require the application of a modified standard to determine whether she had good cause to leave work, i.e., that specific to a reasonable and prudent person with the qualities and characteristics of a person with claimant's alleged impairment. See OAR 471-030-0038(4). Accordingly, for purposes of determining whether claimant had good cause to leave work, we have applied the general good cause standard, that of a reasonable and prudent person without a long-term or permanent impairment.

At hearing, claimant asserted that employer representatives would have private discussions with her each time she exercised her rights under FMLA and took a day off, and suggested this might have been a factor in her decision to leave work. Audio at ~6:19. Claimant also suggested that she decided to leave work because the allegations on which the August 3, 2018 corrective action she received were untrue. Audio at ~8:02. At hearing, the director of operations denied with apparent sincerity that employer representatives met with claimant to criticize her for taking time off under FMLA. Audio at ~28:31. The director of operations also denied that the allegations in the corrective action were fabricated or untrue. Audio at ~25:31. With respect to the parents who made complaints against her, claimant did not deny at hearing that she might have had recent contact with all of them, that the director personally spoke with each parent about their complaints, or that they had described her as the employee with whom they had an objectionable interaction. Other than claimant's general assertion that she was "set up," the evidence in the record does not suggest or tend to suggest that the parents' complaints to the director were fabricated and the result of a concerted effort to damage claimant's work record. Audio at ~8:30.

With respect to the alleged inadequate performance of reception duties in Newberg, claimant did not deny that the director of operations removed certain alleged deficiencies from the corrective action after claimant explained that the regular Newberg receptionist had relieved her from performing some of those duties. Audio at ~27:37, ~28:02, ~36:35. It appears that the director of operations took steps to

ensure that the allegations in the corrective action were accurate. With respect to claimant's failure to timely answer incoming calls, the operations director conceded that the employer had ongoing problems with its phone system and contended that the alleged deficiencies in answering the phones that were identified in the corrective action were based on claimant's performance as compared to other employees who answered the phones. Audio at ~34:02, ~35:14, Claimant did not deny that the standards she was expected to meet in the corrective action were derived from the performance levels achieved by other employees.

On this record, claimant did not show by a preponderance of the evidence that the employer criticized her for taking FMLA leave or that the allegations in the corrective action were inaccurate or fabricated. There was no reason in the record to doubt the credibility of the employer's witness as compared to claimant or to question the accuracy of the testimony of either party's witnesses. Because the evidence is, at best, evenly balanced on these disputed issues and claimant carried the burden of persuasion in this voluntary leaving case, the uncertainty in the evidence must be resolved against claimant. *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). Moreover, the evidence does not support that the corrective action, in and of itself and, created a grave circumstance for claimant. There was no showing that as a result of the corrective action, claimant was likely to be discharged, that any disciplinary sanctions were imposed on her other than improving her performance, or that she otherwise sustained any tangible harms from the corrective action. In addition, assuming the corrective action was the proximate cause of claimant's decision to leave work, claimant did not show that she was unable to attempt to improve her performance to meet the standards set out in the corrective action, and that trying to do so was not a reasonable alternative to quitting.

It appears most likely to us that claimant left work when she did not because of the corrective action, but because she did not want to work for the next two weeks at the Newberg clinic. However, the employer had legitimate business reasons for assigning claimant to work for that time at the Newberg clinic. While claimant might have felt "uncomfortable" working at a clinic where she had so recently received several parent complaints, she did not show that grave circumstances would accrue if she worked for two weeks at that clinic. As well, claimant did not show that, after she performed that work, the employer would not have considered relieving her of further work at the Newberg clinic. On this record, claimant did not show the prospect of working at the Newberg clinic for the upcoming two weeks was good cause to leave work when she did.

Claimant did not show that she had good cause for leaving work on August 9, 2018. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Order No. 18-UI-118220 is affirmed.

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

DATE of Service: November 30, 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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