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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0295

Affirmed
Disqualification

PROCEDURAL HISTORY: On October 28, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #170537). Claimant filed a timely request for hearing. On January 30, 2014, ALJ Bear conducted a hearing, and on January 31, 2014 issued Hearing Decision 14-UI-09660, affirming the Department's decision. On February 19, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB. Claimant failed to certify that she provided a copy of her 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 failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing as required by OAR 471-041-0090. We considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Avamere Sherwood Operations, LLC employed claimant from April 21, 2010 to September 25, 2013 as a med aide in an assisted living facility.

(2) On September 25, 2013, the employer's director of health services and nurse met with claimant to give her a warning because the nurse allegedly saw claimant distribute medication on September 25 without using the employer's electronic medication management (EMAR) system as required by the employer. The nurse also advised claimant she had been rude and curt with him when she responded to his question about a resident earlier that day. Claimant told the employer she would try to use the EMAR system in the manner instructed by the employer, but that it would be difficult due to her time constraints. Claimant disagreed that she had been rude to the nurse, and explained that she was rushing to complete her work at the time.

(3) The director was dissatisfied with claimant's failure to commit to using the EMAR system at all times. The employer considered the EMAR the safest manner to distribute medication. The evening of September 25, 2013, the director called claimant and told her that, for safety reasons, she had to retake the employer's med aide training before the employer would allow her to distribute medication again. The employer gave her the option of taking the training on September 26 and 27, 2013, or working as a caregiver until she completed the next training in three weeks.

(4) On September 26, 2013, claimant sent an email to the employer's executive director, director, and resident care coordinator. Claimant said she had not made medication errors and that the employer should provide additional time for the med aides to perform their duties. She stated she disagreed with the director's decision requiring her to complete the employer's med aide training before returning to her position as a med aide for the employer, and said she did not have time to follow all the EMAR requirements at work and complete her other duties. Claimant did not ask to discuss these issues with the employer. She ended the email by saying, "I unfortunately feel at this point that there is no place for me any longer at Avamere which pains me greatly but seems to be the case. I would like to [inaudible word] come into the building tomorrow to say goodbye to a few of the residents because it will be with a great sadness for them and myself, but I will be unable to care for them any longer." Transcript at 19.

(5) Claimant refused to take the med aide class because she had already taken the med aide class, other med aides were not required to retake the training, and she thought it was unnecessary.

(6) The evening of September 26, 2013, the employer's regional director left claimant a voicemail saying the employer had accepted claimant's resignation. Claimant did not contact the employer regarding the voicemail.

CONCLUSIONS AND REASONS: We agree with the Department and the ALJ that claimant voluntarily left work without good cause.

Claimant testified at hearing that she did not quit work, but that the employer had "fired [her] without actually firing [her]" by taking away her med aide duties until she completed the med aide training again. Transcript at 12. The nature of the work separation is determined not by the parties' characterizations, but by applying Employment Department law. The law provides that, 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) (August 3, 2011). 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). On September 25, 2013, the employer gave claimant the option of retaking the med aide training and continuing to work as a med aide, or continuing to work as a caregiver until she took the med aide training. Under either option, continuing work was available for claimant. The record shows claimant was not willing to accept either option. Claimant testified at hearing that she did not intend to quit, but sent the September 26, 2013 email to the employer hoping the executive director would call her to "work something out." Transcript at 22. However, claimant did not say in her email that she wanted to discuss her situation. Instead, her email showed she was no longer willing to work for the employer when she said, "there is no place for me any longer at Avamere," and that she wanted to go to into the employer's building to "say goodbye" to the residents because, "I will be unable to care for them any longer." Transcript at 19. The work separation was a quit.

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) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P2d 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.

Claimant quit work because she was displeased about having received a warning and having to retake the employer's med aide training before resuming her med aide duties. Claimant disagreed with the employer's decision because she allegedly had used the EMAR on September 25 and had never made a medication error, and because she believed that the training was unnecessary and that the employer had "singled her out" by not requiring other med aides to retake the training. Transcript at 12 to 18. Claimant also asserted that the warning created a "hostile work environment" because the director had closed the door to his office to reprimand her. Transcript at 24. We are not persuaded by claimant's arguments. Regardless of whether claimant used the EMAR in some limited way on September 25 or had ever made a medication error, it was undisputed that claimant was not using the EMAR in the manner instructed by the employer. Nor did claimant commit during the September 25 meeting to doing so in the future. The employer understood EMAR to be the safest manner to ensure the residents received the correct medications, thus it was reasonable for the employer to require med aides to use the EMAR system the way the employer instructed. The employer's director testified at hearing that it required claimant to retake the med aide training to reinforce the importance of using EMAR, and because she was the only med aide who had been seen allegedly distributing medication without using EMAR. Transcript at 41 to 42. The employer's requirement was reasonable under the circumstances. Claimant failed to show that either receiving a warning or having to retake the med aide training was a reason of such gravity that she had no reasonable alternative but to leave work. Nor did claimant show that the she faced a hostile work environment because the employer spoke to her in his office with the door closed, rather than with the door open such that others could overhear. Rather than quit, claimant had the reasonable alternatives of retaking the training and continuing to work.

In sum, claimant did not meet her burden to show that no reasonable and prudent person would have continued to work for her employer for an additional period of time. Thus, she is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-09660 is affirmed.

Tony Corcoran and D. E. Larson;
Susan Rossiter, not participating.

DATE of Service: <u>March 17, 2014</u>

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 website at http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page.

Note: The above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.