EO: 300
BYE: 201428

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

886
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0500

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision #73014). Claimant filed a timely request for hearing. On March 13, 2014, ALJ Lohr conducted a hearing, and on March 14, 2014 issued Hearing Decision 14-UI-12539, affirming the Department's decision. On March 28, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On April 8, 2014, ALJ Lohr issued Amended Hearing Decision 14-UI-14626 to complete the findings of fact and opinion.

We construe claimant's application for review to apply to Hearing Decision 14-UI-14626 because the amendments to Hearing Decision 14-UI-12539 did not change the outcome of the decision. Claimant submitted written argument to EAB on his application for review. Claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not address the argument or consider it when reaching this decision.

FINDINGS OF FACT: (1) Assured Quality Home Care, Inc. employed claimant from September 5, 2013 to October 18, 2013 as an adult caregiver.

(2) The employer was responsible for assigning claimant his clients, and arranging his schedule with the clients. On September 5, 2013, the employer assigned claimant his first client. That assignment ended on October 18, 2013 because the client moved to another state.

(3) On October 15, 2013, the employer assigned claimant a second client. On October 15, 2013, claimant met with the client and worked for him for four hours. Claimant told his supervisor he was concerned he did not have the physical ability to meet the client's caretaking needs. The supervisor told claimant she would try to find a caretaker to replace claimant.

(4) Claimant agreed to care for the client until the employer found a caretaker to replace him, but asked the supervisor approximately six more times before October 18, 2013 if the supervisor had found a replacement. Claimant worked for the client on October 16 and October 17, 2013. A hospice worker

was working temporarily for the client, and completed the physically demanding duties before claimant's shift began each day.

(5) On October 18, 2013, claimant worked part of his final shift for a client who was moving to another state. Claimant left early from his shift because he was sick. Claimant sent his supervisor a text message stating he was sick and asking if she had found a replacement caregiver for the other client. The supervisor had not yet found a replacement and told claimant he needed to work that day. Claimant told the supervisor he was sick and could not work that day. Claimant's supervisor responded that she assumed claimant was quitting his job without notice.

(6) Claimant did not contact the employer to dispute that assumption. He sent the client a text message stating he would not be able to work for the client on October 18 and 19, but would contact him on October 20 to see if the client still needed claimant to work. Approximately one hour later, claimant's supervisor sent claimant a text message stating it prohibited him from contacting the client again, and that she would contact Adult Protective Services if he contacted the client again.

(7) The employer and claimant did not communicate again after that text message.

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

The first issue is the nature of the 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) (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). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a).

Claimant testified that he did not quit his job, and that he was willing to return to work after October 18, once his health improved. Audio Record ~ 7:48 to 7:53, 20:16 to 20:55. However, the record fails to show the employer did not allow him to do so. After claimant told the employer he could not work on October 18, the employer sent claimant a text message saying it assumed claimant had quit. The record does not show claimant made any attempt to clarify to the employer that he was not quitting, or that he intended to return to work when his health improved. Because the employer told claimant it assumed claimant was quitting his job, the onus was on claimant to tell the employer he was willing to return to work once he was no longer sick. It was reasonable for the employer to assume claimant was no longer willing to work for the client because he had repeatedly asked for the employer to find a replacement caretaker, and he did not challenge the employer's assumption that he had quit, even after the employer told him it assumed he quit and that it would call Adult Protective Services if he contacted the client again. Although claimant contacted the client to say he would work on October 20, the employer arranged his assignments and schedule. The work separation occurred because claimant failed to communicate his willingness to return to work to the employer. Because the record shows claimant could have continued to work for the employer for an additional period of time, the work separation was a quit.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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 his employer for an additional period of time.

We infer that claimant quit because he mistakenly assumed from the employer's text messages that it had discharged him. Thus, the issue is whether no reasonable and prudent person would have contacted the employer to confirm he was willing to work once his health improved. The employer did not tell claimant he was discharged. Rather than allowing the employer to assume he had quit, claimant had the reasonable alternative of contacting the supervisor to explain that he was not quitting, and would return to work when his health improved. Claimant failed to show that no reasonable and prudent person would have contacted the employer to clarify that he had not quit work, and was willing to continue working for the employer.

We therefore conclude that claimant quit work without good cause, and that he is disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 14-UI-14626 is affirmed.

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

DATE of Service: <u>April 24, 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.