

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0545

*Modified
Disqualification*

PROCEDURAL HISTORY: On December 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision #121044). The employer filed a timely request for hearing. On March 21, 2014, ALJ Wipperman conducted a hearing, and on March 28, 2014 issued Hearing Decision 14-UI-13737 concluding the employer discharged claimant for misconduct. On April 3, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Somerset Assisted Living employed claimant from June 10, 2010 to November 23, 2013 as a resident assistant.

(2) Claimant's son was eleven years old and often walked to the school bus stop, waited at the bus stop, and boarded the bus alone while claimant was at work. He called claimant when he left home to let her know he was walking to the bus stop, and sent her a text message when he had boarded the bus. Claimant served breakfast to the residents at work from 8:00 a.m. to 8:40 a.m. Her son called and sent the text message between 8:00 a.m. and 8:30 a.m. Claimant would feel her cell phone vibrate when her son contacted her, and would stop working check the messages out of view of the residents. She was not on break at that time. Her break began at 9:15 a.m.

(3) The employer had reprimanded some employees for using their cell phones while providing resident care. Claimant had not been reprimanded for cell phone use.

(4) In November 2013, the employer implemented a new cell phone policy prohibiting some employees, including claimant, from carrying or using cell phones while on duty. The policy permitted employees to receive telephone messages at the employer's front desk while on duty. The employees could use their cell phones while on break and during lunch.

(5) On November 22, 2013, the employer's administrator asked claimant to review and sign the new cell phone policy. Claimant told the administrator she disagreed with the policy and that she wanted time to discuss the policy with her husband. The administrator told claimant the employer could not force claimant to sign the policy, but that she had to sign the new policy if she wanted to continue working for the employer. The administrator told claimant she could have one paid day of leave to decide if she would continue her employment with the employer, which would require her signing and adhering to the new policy. The administrator told claimant to contact the employer the next day with her decision.

(6) On November 23, 2013, claimant told the administrator that she would not sign the new policy because she needed to have her cell phone so her son could contact her because he catches the bus alone. Claimant asked if she could use her telephone between 8:00 and 8:30 a.m. each day, during the time when her son was walking to the bus stop and catching his bus. The administrator refused to make an exception to the policy for claimant. The administrator told claimant that family members were permitted to call the building number, and that claimant could check her cell phone on her breaks and lunch. The administrator told claimant that, if she chose to continue working for the employer, she had to sign the policy. Claimant told the employer she would not sign the policy.

CONCLUSIONS AND REASONS: We conclude claimant voluntarily left work without good cause.

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).

The ALJ determined that the employer discharged claimant, reasoning that the employer would not allow claimant to continue working when she refused to sign the new cell phone policy.¹ However, it was claimant who severed the employment relationship. The employer presented claimant with its new cell phone policy on November 22, 2013. Although claimant disagreed with the new cell phone policy, it did not affect claimant's ability to continue working for the employer for an additional period of time. The policy only changed the conditions of claimant's continued employment. Had claimant been willing to continue working under the new cell phone policy, she could have continued to work for the employer. Because continuing work was available to claimant after November 23, 2013, and claimant chose not to work, claimant quit work under OAR 471-030-0038(2).

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.

¹ Hearing Decision 14-UI-13737 at 3.

Claimant left work because accepting the employer's new cell phone policy prohibited her from carrying her cell phone while on duty, and from receiving calls and text messages from her son on her personal telephone while she was on duty. Claimant failed to show that the employer's cell phone policy created a situation of such gravity that she had no reasonable alternative but to quit. Employers have a right to expect employees to refrain from using their cell phones while on duty, and to expect employees to arrange for appropriate care for their minor children during work. The employer allowed employees to receive telephone messages through the employer's office, and to use their personal cell phones during breaks and lunch time. Thus, the employer's policy did not prevent claimant from being reached in case of emergency, or from using her telephone when she was not on duty. Claimant did not show that having her son call the building telephone was an unreasonable alternative to quitting. Claimant failed to show that no reasonable and prudent person would have continued to work under the new cell phone policy.

Claimant voluntarily quit work without good cause, and is therefore disqualified from receiving unemployment benefits based on this work separation.

DECISION: Hearing Decision 14-UI-13737 is modified, as outlined above.

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

DATE of Service: May 2, 2014

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.