

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0626

*Affirmed
Disqualification*

PROCEDURAL HISTORY: On February 19, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 59829). Claimant filed a timely request for hearing. On March 13, 2014, ALJ Erwin convened a hearing but continued it because the parties had not received notice that whether claimant was an independent contractor was at issue. On March 13, 2013, the Office of Administrative Hearings (OAH) served notice to the parties that a hearing was scheduled to consider whether claimant was an independent contractor in addition to whether claimant's work separation was disqualifying. On April 2, 2014, ALJ Frank conducted a hearing, and on April 11, 2014 issued Hearing Decision 14-UI-14945, concluding claimant was not an independent contractor and claimant voluntarily left work without good cause. On April 15, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument which offered new reasons about why she left work and included documents that were not offered into evidence at the hearing to support these new reasons. Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Claimant also failed to show that factors or circumstances beyond her reasonable control prevented her from offering the new information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). Because claimant's written argument did not comply with the applicable regulations, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The employer's written argument complied with the applicable regulations, and EAB considered it when reaching this decision.

FINDINGS OF FACT: (1) Helen Blevins retained claimant's services as an in-home caregiver from October 1, 2013 until December 2, 2013. Claimant cooked for Ms. Blevins, performed some housekeeping and tended to Ms. Blevins's needs. Ms. Blevins had Parkinson's Disease and was unable to communicate well. Linda Buell, Ms. Blevins's daughter, coordinated and scheduled claimant's caregiving services for her mother.

(2) Claimant had a business entity, Heart, Home and Family, LLC, which she organized for providing her caregiving services. Claimant provided caregiving services for only one client until each job ended. During the time that claimant provided services to Ms. Blevins, Ms. Blevins was claimant's only client. Claimant did not maintain a place of business separate from the residence of her particular client. Claimant did not market or advertise her services to potential clients. Claimant's work did not require her to have a license and claimant did not provide a bond or have any liability insurance covering her services. Claimant did not provide any tools or equipment to perform her job duties. Ms. Blevins paid claimant \$100 for each 24 hour day that she worked. Ms. Buell scheduled claimant for three days of work each week for which she was paid \$300. Ms. Blevins paid claimant weekly for her work by a check make out to claimant individually and not to Heart, Home and Health, LLC. While at work, claimant's followed a checklist of duties that was given to her by the care team as well as what she could determine were Ms. Blevins's needs during her shift.

(3) Until the final weekend in November 2013, claimant worked for Ms. Blevins on Fridays, Saturdays and Sundays. On Thanksgiving, November 28, 2013, Ms. Blevins had an accident and was briefly hospitalized. As a result of Ms. Blevins' hospitalization, claimant was notified that she did not need to work on Friday, November 29, 2013 through Sunday, December 1, 2013.

(4) On approximately December 2, 2013, Ms. Buell called claimant to tell claimant that Ms. Blevins was being released from the hospital and that claimant was needed to work her usual schedule on Friday, December 6, 2013 through Sunday, December 8, 2013. Claimant told Ms. Buell that she could not work for Ms. Blevins because claimant's daughter had just given birth and the daughter was experiencing complications from the birth. Claimant told Ms. Buell that she "wasn't coming back [to provide caregiving services for Ms. Blevins]" and, instead, she was going to care for her daughter and the new baby. Audio at ~18:25, ~19:06, ~19:27. Claimant did not mention to Ms. Buell that her inability to work for Ms. Blevins was temporary, or that she would be able to work after the weekend of December 6, 2013 through December 8, 2013. Ms. Buell understood that claimant had quit work and promptly hired a new caregiver to provide care for Ms. Blevins on Fridays through Sundays.

(5) On approximately December 4, 2013, claimant called Ms. Buell and asked if she could work for Ms. Blevins on weekdays. Ms. Buell told claimant that she had no weekday openings.

(6) On February 11, 2013, claimant completed and submitted to the Department a form inquiring about why she was no longer working for Ms. Blevins. In her response, claimant stated she was unable to continue working for Ms. Blevins "due to heavier care of client" and that she "chose not to continue [the] service contract." Exhibit 1 at 1. During the time claimant worked for Ms. Blevins, claimant's duties had not been increased and claimant never told Ms. Buell that any physical limitations interfered with her performance of her job duties.

CONCLUSIONS AND REASONS: Claimant was not an independent contractor and had an employment relationship with Ms. Blevins. Claimant voluntarily left work without good cause.

Employment Relationship. Claimant contended at hearing that she was an independent contractor working for Ms. Blevins. Audio of March 13, 2013 Hearing (Audio 1) at ~8:57 *et seq.*; Audio of April 2, 2013 Hearing (Audio 2) at ~24:59. However, the proper characterization of claimant's work relationship with Ms. Blevins is not determined by claimant's beliefs, but by applying the relevant statutes and regulations to the facts of claimant's relationship with Ms. Blevins. Although the employer contended otherwise in its written argument, we note that, if claimant was performing services for Ms. Blevins as an independent contractor at the time of the work separation, that separation was, by definition, not disqualifying under ORS 657.176(2). See *Joellen Shannon* (Employment Appeals Board, 11-AB-3054, December 7, 2011); *Brian J. Newrones* (Employment Appeals Board, 10-AB-0666, March 18, 2010).

Under ORS 657.040(1), any person who contends that a claimant is an independent contractor has the burden of proving that status under ORS 670.600(2)(a) and (b), which provide that an independent contractor is one who is free from direction and control over the means and manner of providing the services subject only to the right of the person for whom the services are provided to specify the desired results, and is customarily engaged in an independently established business. Although claimant had established a business entity through which she intended to provide caregiving services this, alone, is insufficient to establish that she was engaged as an independent contractor. All the other evidence in the record suggests otherwise. Ms. Buell testified at hearing that she hired claimant as an individual seeking work and was not aware of any business entity that claimant had formed. Audio 2 at ~11:38, ~12:04. Ms. Blevins paid claimant by checks made out to claimant's personal name and not to her business entity. Audio 2 at ~27:53. Claimant had only Ms. Blevins as a client, did not advertise or market her services to others and did not have a separate business location. Audio at ~26:00, ~28:07, ~36:24. The evidence is scant that claimant was actually providing her services as an independently established business. Moreover, claimant received pay for each 24 hour shift that she worked rather than by the job or task. Audio 2 at ~26:06. Claimant's work schedule was determined by Ms. Buell, and claimant needed to remain on Ms. Blevins's premises during the time she was scheduled, presumably because an important part of her work was simply being there to watch over Ms. Blevins. There was no evidence that claimant could complete the work for which she was hired at a time of her own choosing and still receive her full pay. With respect to the specific duties claimant performed, claimant received directions from a checklist compiled by the care team or took instruction from Ms. Blevins. Audio 2 at ~12:38, ~26:25. On this record, there is no evidence that claimant was free from direction and control in determining the manner or means by which she performed her work for Ms. Blevins. More likely than not, claimant was not an independent contractor when she provided services to Ms. Blevins. OAR 471-030-0038(1) (August 3, 2011) states that, for purposes of ORS 657.176(2), an employment relationship exists even in circumstances where the work performed is not subject employment as set forth in ORS chapter 657. Because it was not established that claimant was an independent contractor, whether claimant's work separation was disqualifying is determined by applying ORS 657.176(2).

The Work Separation. The first issue this case presents in determining whether the work separation was disqualifying is the nature of that separation. If claimant could have continued to work for the same employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the same employer for an additional period

of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b). Claimant contended at hearing that, when Ms. Buell told her that her mother was hospitalized and claimant would not be working on the upcoming weekend, "I took that as being laid off." Audio at ~28:54; *see also* Exhibit 1 at 1. However, claimant did not dispute that Ms. Buell had limited the cancellation of claimant's work shifts to only one weekend, and claimant did not cite any statements by Ms. Buell that reasonably could be construed as manifesting an intention to end the employment relationship. Claimant also agreed that she had told Ms. Buell, when Ms. Buell brought up on December 2, 2013 claimant's scheduled work on the upcoming weekend, that her daughter had just given birth and sustained complications, which claimant logically would do only if she was explaining why she could not continue to work for Ms. Blevins. Audio at ~28:54. There was also no logical explanation for why claimant called Ms. Buell inquiring about available work on December 4, 2013 unless claimant had previously notified Ms. Buell that she was no longer going to be working her regularly scheduled shifts. Audio at ~28:54. More likely than not, claimant's work separation was a voluntary leaving on December 2, 2013, when claimant told Ms. Buell that she was not going to continue working for Ms. Blevins.

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). 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.

It is difficult to determine exactly why claimant decided to leave work. Claimant took the position at hearing that her daughter's complications from childbirth did not limit her ability to work, and stated that she had a "back up plan" and a "back up person" to care for her grandchild and, if needed, her daughter that enabled her to continue working for Ms. Blevins. Audio at ~28:54, ~31:21. By this clear testimony, claimant did not demonstrate that her family circumstances were a grave reason to leave work. Claimant conceded she told the Department on its form that she was not able to continue working due to "heavier care of client," and by that statement she contended that she meant a "bad back." Audio at ~33:29; Exhibit 1 at 1. It is difficult to reconcile claimant's statements of her physical limitations with the undisputed fact that she called Ms. Buell seeking work on December 4, 2013. Moreover, claimant admitted that she never told Ms. Buell about any physical conditions that interfered with her caregiving work. Audio at ~34:04. A reasonable and prudent caregiver, exercising ordinary common sense, who wanted to remain employed, would have told her employer of her physical limitations and determined that no accommodation could or would be made before deciding to quit work. Because claimant did not take the actions of a reasonable and prudent person before quitting work, she did not show that her physical limitations were good cause for her to leave work.

Claimant left work without good cause. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-14945 is affirmed.

Susan Rossiter and Tony Corcoran;
D. E. Larson and J. S. Cromwell, *pro tempore*, not participating.

DATE of Service: May 21, 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>.

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