

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0790

Affirmed
Disqualification

PROCEDURAL HISTORY: On April 7, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 12149). Claimant filed a timely request for hearing. On May 1, 2014, ALJ Sime conducted a hearing at which the employer did not appear, and on May 2, 2014 issued Hearing Decision 14-UI-16710, affirming the Department's decision. On May 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she described her emotional state at the time she left work, apparently as a reason for her decision to quit work. Although claimant had ample opportunity at hearing to explain her reasons for leaving, she did not mention anything about her emotional state in her testimony. Because claimant's argument 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 the new information during the hearing, EAB did not consider it. *See* OAR 471-041-0090 (October 29, 2006). Under ORS 657.275(2) and OAR 471-041-0090, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Neighborhood Economic employed claimant as a financial counselor from June 6, 2013 until March 21, 2014. The employer provided services to assist people in purchasing homes and avoiding foreclosures.

(2) By December 2013, the employer had informed claimant that her position was going change as of January 2014 and that, to continue working for the employer, she needed to accept those changes. The duties in the new position were similar to claimant's previous duties except that claimant's work was no longer going to be performed as part of a team. Claimant agreed to the changes. Sometime in December 2013, the person who was going to become claimant's supervisor in the new position told claimant that the employer wanted her to quit a part-time job that she had in order to "pay more

attention" to her new position for the employer. Audio at ~8:46. Claimant quit her part-time job before she started in her new position.

(3) On January 2014, claimant started work in the new position. Just after claimant started the new position, claimant's supervisor reviewed her expectations with claimant and emphasized that claimant needed to perform work according to various timelines. The supervisor told claimant that if she did not complete her work within the time periods specified, claimant was going to "face the consequences." Audio at ~ 3:45. After this discussion, claimant did her best to abide by any deadlines.

(4) On February 28, 2014, claimant met with her supervisor for a review of her performance in the new position. During the performance review, the supervisor added many new expectations of claimant and new performance deadlines. Although claimant told her supervisor the work in the new position "exhausted" her, the supervisor did not ask claimant to explain that comment and did not express any appreciation for the work that claimant had accomplished in the new position. Audio at ~ 6:40, ~7:07. By the supervisor's failure to comment on the quality of claimant's work during the performance review, claimant concluded that the supervisor thought "very poorly" of her and her work performance. Audio at ~6:06.

(5) After February 28, 2014, claimant tried to perform the work that her supervisor had set out during the performance review. The supervisor sometimes thanked claimant for the work she had completed, but sometimes told claimant that the work did not meet the supervisor's expectations. Audio at ~19:17, ~19:47.

(6) On March 7, 2014, claimant met with her supervisor and the project manager to review her performance. Claimant thought the supervisor was "disappointed" in her work. Audio at ~10:13. During the performance review, claimant was given a probationary action form. The probationary action form set out deadlines by which claimant needed to complete certain work and required claimant to meet weekly with her supervisor to assess her progress. The form stated that if claimant did not comply with its terms, claimant was "subject to further disciplinary actions including termination." Audio at ~10:36, ~11:40. Claimant thought that some of the deadlines stated in the form were "unrealistic" and she could not comply with them. Audio at ~11:40, ~16:49. When claimant told the supervisor and the project manager that she could not meet the deadlines because she was no longer working as part of a team and receiving help from a team, the project manager told claimant that her "work was not going to be part in a team work environment anymore." Audio at ~21:59. The supervisor told claimant that she was "going to be watching me very closely for a couple of months and if I didn't do well, I had to face the consequences." Audio at ~22:18. Based on these statements and the language of the probationary action form, claimant concluded that the employer intended to discharge her.

(7) On March 7, 2014, claimant notified the employer she was going to quit work on March 21, 2014. Claimant left work on March 21, 2014 and did not return. Claimant quit work because she thought the employer was going to discharge her.

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) (August 3, 2011). 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.

The only reason that claimant gave for leaving work was that she thought the employer intended to discharge her. Audio at ~3:33, ~12:43, ~14:00, ~23:26. Although an impending discharge that is not for misconduct may be good cause to leave work, claimant had the burden to show that her discharge was reasonably certain and likely imminent. *See e.g., Mark A. Sorenson* (Employment Appeals Board, 12-AB-2907, November 28, 2012) (claimant had good cause to quit work to avoid an inevitable discharge, not for misconduct); *Susan L. West* (Employment Appeals Board, 12-AB-2961, November 16, 2012) (claimant had good cause to leave work to avoid an imminent or inevitable discharge that was not for misconduct); *Thomas R. Bailey* (Employment Appeals Board, 12-AB-1609, June 27, 2012) (claimant had good cause to quit work when his discharge, not for misconduct, was all but assured). However, EAB has consistently held that a discharge is not reasonably certain or imminent, and good cause is not shown, merely because an employer placed a claimant on a performance improvement plan if there is no other evidence demonstrating that the employer intended to discharge claimant. *See e.g., Megan E. Lenzen* (Employment Appeals Board, 2014-EAB-0266, March 18, 2014) (claimant did not show good cause to quit work when, although she was placed on a performance improvement plan, the employer had not told her it was going to discharge her and claimant retained the opportunity to continue to work to try to fulfill the conditions of the plan); *Sharon N. Martin* (Employment Appeals Board, 12-AB-2916, November 19, 2012) (claimant did not have good cause to quit work to avoid a performance improvement plan that she thought would culminate in her discharge when there was no evidence showing that her discharge was inevitable); *Dora S. Redford* (Employment Appeals Board, 12-AB-2914, November 19, 2012) (claimant did not have good cause to quit work to avoid a performance improvement plan she thought would result in her discharge, but discharge was not inevitable).

In this case, claimant did not identify any communications by her supervisor or any other representatives of the employer that demonstrated, more likely than not, that the employer was going to discharge her. Audio at ~12:43, ~14:38. Reasonably construed, the comments of claimant's supervisor showed only that employer intended to watch claimant's performance to determine if she could comply with the probationary action form. Although the language claimant cited in the probationary action form indicated that if claimant did not perform in line with its deadlines the employer could discharge claimant, claimant did not show, more likely than not, that it was inevitable that she would not meet the deadlines set out in the probationary action form and that, if she did not, it was inevitable that the employer would impose discharge as the appropriate sanction rather than a less severe disciplinary measure. Claimant therefore did not show that her discharge was reasonably certain and reasonably imminent. On this record, a reasonable and prudent employee, exercising ordinary common sense, would not have quit work when claimant did, but would have continued to work to try to fulfill the terms of the probationary action form until the probationary period was completed.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-16710 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 18, 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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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