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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-1190

Reversed
Disqualification

PROCEDURAL HISTORY: On February 11, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 115750). The employer filed a timely request for hearing. On April 7, 2014, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for April 18, 2014. On April 18, 2014, ALJ Murdock conducted a hearing in which the claimant did not participate, and issued Hearing Decision 14-UI-15546, concluding that claimant voluntarily left work without good cause. On May 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB). On May 20, 2014, EAB issued Appeals Board Decision 2014-EAB-0801, reversing Hearing Decision 14-UI-15546, and remanding this matter for a new hearing and hearing decision. On June 11, 2014, ALJ R. Davis conducted a hearing, and on June 17, 2014 issued Hearing Decision 14-UI-19828, concluding the employer discharged claimant, not for misconduct. On June 30, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) McMenamins Inc. employed claimant as an assistant assistant manager from August 4, 2011 to October 7, 2013.

(2) On September 4, 2013, claimant reported to the employer's human resources department that the employer's assistant manager had sexually harassed her on multiple occasions.

(3) On September 10, 2013, claimant served three male customers on the employer's patio. One of the customers paid their bill with a credit card, signed the credit card receipt, "fuck you," and told claimant

she "shouldn't talk so much." Transcript at 18. The customers also broke some plates and glasses, the value of which was under $10. Claimant reported the incident to the employer.

(4) On September 11, 2013, the employer's general manager informed claimant that he was investigating her sexual harassment complaint against the assistant manager. The general manager asked claimant to describe the alleged harassment, and whether there were any witnesses. Claimant described the alleged harassment, and stated that she did not know whether there were any witnesses. The general manager told claimant not to discuss her complaint with anyone while his investigation was pending.

(5) The general manager told claimant to notify him immediately if anyone retaliated against her for filing her sexual harassment complaint. Claimant told the general manager she believed the incident with the customers on September 10 was related to her complaint. The general manager stated that he did not believe the incident was related to her complaint. The general manager assured claimant that the employer would do what was necessary to ensure claimant was safe at work.

(6) The general manager also encouraged claimant to assist the employer in reporting the incident with the customers to the police. On September 11, 2013 claimant assisted the employer's pub manager in doing so. Claimant did not report to the police or the pub manager that she believed the incident was related to her sexual harassment complaint against the assistant manager.

(7) The employer posted the name on the credit card the customer used on September 10, claimant's description of the customer, and a police officer's telephone number. The employer instructed employees to telephone the police officer if the customer returned.

(8) The general manager questioned the assistant manager and claimant's coworkers about claimant's sexual harassment complaint. The assistant manager denied claimant's allegations, and none of claimant's coworkers reported witnessing any of the alleged harassment.

(9) On September 17, 2013, the general manager told claimant that the assistant manager had denied claimant's allegations, and that none of claimant's coworkers reported witnessing any of the alleged harassment. The general manager told claimant that the assistant manager would not be disciplined.

(10) While at work on October 5, 2013, claimant received a telephone call from an anonymous male caller who told claimant that she needed to quit work if she did not want anything to happen to her or her family. Claimant reported the incident to the police, but not the employer. Instead, she left the pub manager a note stating that she was resigning her position. On October 7, 2013, the pub manager received the note and asked claimant to elaborate. Claimant added to the note that her last day of work would be October 19, 2013.

(12) On October 7, 2013, claimant received a telephone call from an anonymous male caller who told claimant that she needed to quit work immediately if she did not want anything to happen to her or her family. Claimant was unwilling to continue to work for the employer after receiving the call, and therefore did not report for work as scheduled on October 8, 2013.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant quit work without good cause.

OAR 471-030-0038(2)(b) (August 3, 2011) states that 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. 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) (August 3, 2011).

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.

ORS 657.176(6) provides that when an individual has notified an employer that the individual will leave work on a specific date and it is determined that the separation would be for reasons that constitute good cause, that the individual voluntarily left work without good cause prior to the date of the impending good cause voluntary leaving date, and that the actual voluntary leaving of work occurred no more than 15 days prior to the planned date of voluntary leaving, then the separation from work shall be adjudicated as if the actual voluntary leaving had not occurred and the planned voluntary leaving had occurred. However, the individual shall be ineligible for benefits for the period including the week in which the actual voluntary leaving occurred through the week prior to the week of the planned good cause voluntary leaving date. *Id*.

In Hearing Decision 14-UI-19828, the ALJ concluded that the employer discharged claimant, asserting that claimant's account of the nature of the work separation was more persuasive than that of the employer's pub manager.[1] More specifically, the ALJ asserted the pub manager's testimony that she did not know why claimant quit work "lacked candor and was implausible."[2] The ALJ further asserted that the pub manager's testimony that the employer did not terminate claimant's employment until she was absent from work for three days was contradicted by the fact that the employer's changed its safe combination after claimant was absent from work only one day, which would not "make sense" if claimant was going to be allowed to continue to work.[3] The ALJ therefore was persuaded by claimant's testimony that she notified the employer she would be absent from work, and that the pub manager

[1] *Id*.

[2] *Id*.

[3] Hearing Decision 14-UI-19828 at 3.

discharged her when she explained that she would not report for work because she had received anonymous telephone calls threatening her and her family if she did not quit.[4]

We first disagree with the ALJ's assertion that the supervisor's testimony that she did not know why claimant quit work lacked candor or was implausible. The only evidence that claimant explained to the supervisor she had received threatening telephone calls at work is claimant's testimony that she did, which the supervisor consistently denied, and which was contradicted by claimant's testimony that she did not report the threatening telephone calls to the employer. Transcript at 6-8, 22-24, 32, 37-39, 62. Nor do we find it nonsensical that an employer would change its safe combination as a precautionary measure after an assistant manager notifies the employer she is quitting work in two weeks, and then fails to report for work as scheduled. Regardless, the ALJ's analysis overlooks claimant's testimony that after receiving the second threatening telephone call, she "decided that it was best to just quit," and "felt like my only option was to quit." Transcript at 14-15, 62. Thus, even if the employer decided to terminate claimant's employment after she was absent for only one day, claimant's own testimony shows that she was absent from work that day because she was unwilling to continue working for the employer. Because claimant instead could have decided to report for work as scheduled and continued to work for the employer for an additional period of time, the work separation is a voluntary leaving, and not a discharge.

At hearing, claimant asserted that she quit work without reporting the threatening telephone calls to the employer, or the second call to the police, because she believed doing so would have been futile, given the employer's responses to her sexual harassment complaint and incident with the customers. Transcript at 14-15, 62. However, the employer thoroughly investigated claimant's sexual harassment complaint against the assistant manager, and the general manager specifically instructed claimant to notify him immediately if anyone retaliated against her. The record fails to show the incident with the customers was an act of retaliation or otherwise related to claimant's sexual harassment complaint. The employer responded appropriately to the incident by filing a police report, posting the name on the credit card the customer used, claimant's description of the customer, and the telephone number of a police officer to call if the customer returned. The general manager assured claimant that the employer would do what was necessary to ensure claimant was safe at work.

The employer's responses to claimant's sexual harassment complaint and incident with the customers therefore fail to support claimant's assertion that reporting the threatening telephone calls to the employer, and the second call to the police, likely would have been futile. The pub manager testified that if claimant had told her about the threatening telephone calls, she would have reported them to the police. Transcript at 38. Absent evidence that the employer was unwilling or unable to grant claimant a leave of absence while the employer and the police investigated the threatening telephone calls and attempted to resolve the situation, claimant failed to establish that she had no reasonable alternative but to quit when she did.

We therefore conclude that claimant quit work without good cause on October 7, 2013, and that her planned on October 19, 2013 also would have been without good cause. Claimant therefore is disqualified from the receipt of benefits based.

[4] *Id*.

DECISION: Hearing Decision 14-UI-19828 is set aside, as outlined above.

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

DATE of Service: August 6, 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.