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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-1394

Modified
Disqualification

PROCEDURAL HISTORY: On June 17, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 141804). Claimant filed a timely request for hearing. On July 17, 2014, ALJ Vincent conducted a hearing, and on August 4, 2014 issued Hearing Decision 14-UI-22727, modifying the Department's decision and concluding the employer discharged claimant, not for misconduct, within 15 days prior to claimant's planned quit without good cause. On August 22, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

In written argument, claimant asserted the ALJ erred by not taking testimony from a witness who worked in the employer's accounting department. However, the ALJ told claimant at the beginning of the hearing that he could call the witness during the hearing. Claimant never asked the ALJ to call the witness, and declined the ALJ's offer for her to "introduce any other evidence" before he ended the hearing. Transcript at 31. The ALJ therefore did not err in not taking testimony from the witness.

Claimant also asserted in her written argument that she had good cause to quit work. However, claimant failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). We therefore did not consider that portion of claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) INS Corp. employed claimant from June 22, 2013 to May 28, 2014 as a production manager at an advertising agency.

(2) In 2014, claimant's workload increased due to a reduction in the employer's staff. Claimant worked approximately five more hours per week than she had during 2013 with no increase in her salary. Claimant felt increased stress from work, and had frequent tension headaches. Claimant did not discuss her workload, stress or headaches with the employer. Claimant did not seek medical treatment for her headaches during her employment.

(3) The employer's president often used foul language when she made critical comments to claimant about her work. The president made comments including, "I might as well fucking do it myself," and, "You don't fucking get it. This isn't fucking brain surgery." Transcript at 10. The president also told claimant that a monkey could do her job and, "Fucking high schoolers could have done a better job." Transcript at 12. Claimant did not complain or tell the president she was offended by her statements or use of foul language.

(4) On April 29, 2014, the president instructed claimant to created invoices for a client, and to increase the charges in the invoices for certain costs paid by the client. Claimant told the president that she felt uncomfortable increasing the charges for the costs because the client's contract with the employer prohibited the increased charges.

(5) On May 13, 2014, claimant gave the employer notice that she would quit on May 30, 2014 because she was dissatisfied with her working conditions and was unwilling to prepare invoices for one client containing increased charges for certain costs.

(6) On May 28, 2014, claimant and the employer's receptionist attended a farewell office function for them. The employer's president did not know about the party and became angry when she noticed the receptionist was not at her desk answering the telephone. She found claimant and the receptionist at the party, and noticed there was wine at the party. The president said, "What is this, fuck Barb day?" Transcript at 27. It was the receptionist's last day of work. The president told the receptionist she could leave at that time, and returned to her office.

(7) After the party, claimant went to the president's office, put some paperwork on the president's desk, and immediately left work. She did not return to work on May 29 or 30, 2014.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause.

In Hearing Decision 14-UI-22727, the ALJ found as fact that the employer discharged claimant on May 28, 2014.[1] However, the parties disputed the nature of the May 28 work separation, which must be addressed as a question of law. OAR 471-030-0038(2)(b) (August 3, 2011) provides 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 work separation is a discharge. If the employee could have continued to work for the same employer for an additional period of time, the separation is a voluntary leaving. OAR 471-030-0038(2)(a).

At hearing, claimant testified that the employer's president shouted, "she's out of here . . . while flailing her left arm up and down, in [claimant's] direction," when returning to her office after leaving the May 28 farewell party. Transcript at 15-16. However, the employer's president and its media director, both present at the time, testified that the president did not say "she's out of here," or otherwise indicate claimant should leave work that day. Transcript at 21-22, 27, 30. The employer's witnesses' testimony outweighs claimant's uncorroborated testimony. The record therefore shows that claimant left work on May 28 and did not return on May 29 or 30 because she was unwilling to continue working for the

[1] Hearing Decision 14-UI-22727 at 2.

employer, and not because the employer prevented her from doing so. Because claimant could have continued to work for the employer for an additional period of time, the work separation is a quit.

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. However, ORS 657.176(6) provides:

> For purposes of applying subsection (2) of this section, when an individual has notified an employer that the individual will leave work on a specific date and it is determined that:
>
> (a) The separation would be for reasons that constitute good cause;
>
> (b) The individual voluntarily left work without good cause prior to the date of the impending good cause voluntary leaving date; and
>
> (c) 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.

On May 28, 2014, claimant told the employer she would quit work on May 30, 2014. She subsequently quit work on May 28, 2014. Because claimant quit work two days prior to her planned quit date of May 30, 2014, we must consider the application of ORS 657.176(6) to claimant's voluntary leaving.

To determine if ORS 657.176(6) applies to claimant's work separation, it is first necessary to decide if the planned quit was for reasons that constitute good cause. ORS 657.176(6)(a). Claimant planned to leave work on May 30, 2014 because of how her supervisor treated her, her increased work load, and her concerns about the invoices the employer asked her to prepare. To the extent claimant planned to quit work due to how the president treated her, claimant failed to establish that the planned quit was for good cause. Claimant's testimony was persuasive that the president made critical statements and used foul language on a regular basis regarding claimant's work product. Claimant also alleged the supervisor slapped her buttocks once when claimant walked by her. Transcript at 10. At hearing, the president denied she did so. Transcript at 19. The evidence as to whether the president slapped claimant is equally balanced. Absent a reason to disbelieve either party, where the evidence is equally balanced, the party with the burden of proof, here, claimant, has failed to meet her evidentiary burden. Consequently,

claimant failed to establish that the president slapped her buttocks. Although the president's established behavior was unprofessional, it was not so egregious that claimant had no reasonable alternative but to quit work without complaining or telling the president she was offended by her comments, and allowing the president an opportunity to correct her behavior. Claimant did not assert, and the record does not show, that doing so would have been futile.

To the extent claimant planned to leave work due to the increase in her workload, claimant did not show her planned quit was for good cause. Claimant testified that she felt stress and had tension headaches due to her workload. However, claimant did not complain to the employer about her workload, work-related stress or headaches. Nor did she seek medical treatment for her headaches during her employment. Claimant failed to establish that her increased work created a situation of such gravity that no reasonable and prudent person would have continued to work for her employer.

Claimant planned to leave work, in part, because she considered the employer's practice of "marking up" certain costs on one client's invoices to be unethical and a breach of the employer's contract with the client. Transcript at 11-12; Exhibit 1, Daniel Armstrong Statement. The employer disputed that the practice was a violation of its contract with the client based on the terms of the contract and legal advice it received from its attorney, who allegedly advised the employer to seek additional costs from the client because it had undercharged the client. Transcript at 19-20. Consequently the evidence regarding the legality of the charges on the invoices was no more than equally balanced between the parties. Where the evidence is equally balanced, the party with the burden of proof, here, claimant, has failed to satisfy her evidentiary burden. Consequently, claimant failed to establish the offending business practice was a breach of the employer's contract with the client or unethical. Absent such a showing, claimant failed to establish that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

Thus, because claimant failed to show that the planned quit on May 30, 2014 would have been for reasons that constitute good cause, ORS 657.176(6) does not apply to her work separation, and claimant is disqualified from the receipt of benefits unless she proves, by a preponderance of the evidence, that she had good cause for leaving work on May 28, 2014. ORS 657.176(2)(c). Claimant failed to show she had good cause for quitting work on May 28, 2014. We infer from the facts that claimant quit work that day, rather than on May 30, because of the president's behavior when she discovered the receptionist was at a farewell party without the president's knowledge, and not answering the telephone. Claimant failed to show that the president's behavior, despite her use of foul language, was so egregious that no reasonable and prudent person would have continued to work for her employer for an additional period of time.

In sum, claimant quit work on May 28, 2014 without good cause, and therefore is disqualified from the receipt of unemployment insurance benefits.

DECISION: Hearing Decision 14-UI-22727 is modified, as outlined above.

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

DATE of Service: <u>September 25, 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 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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