EO: 990
BYE: 201440

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

783
VQ 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1670

Affirmed
Disqualification

PROCEDURAL HISTORY: On August 20, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 82139). Claimant filed a timely request for hearing. On October 6, 2014, ALJ R. Davis conducted a hearing, and on October 9, 2014 issued Hearing Decision 14-UI-26731, affirming the Department's decision. On October 29, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new facts that did not appear in her hearing testimony and included a document that she did not offer into evidence at the hearing. Claimant did not explain why she did not offer this new information during the hearing, and otherwise failed to show that factors or circumstances beyond her reasonable control prevented her from doing so as required by OAR 471-041-0090(2) (October 29, 2006). Because claimant did not comply with the applicable regulation, EAB considered only information received into evidence at the hearing when reaching this decision.

FINDINGS OF FACT: (1) Pearl Medspa, LLC employed claimant from December 20, 2012 until October 1, 2013.

(2) Before October 2013, claimant thought that she had a good working relationship with the employer's chief operating officer (CEO). The CEO was usually tolerant when claimant called in to report that she was unable to work on scheduled days. During her employment, claimant received no disciplinary warnings for work attendance.

(3) On Sunday, September 29, 2013, when she was off work, claimant was involved in an automobile accident. As a result of the collision, claimant sustained a whiplash injury to her neck and immediately went to an urgent care facility. A physician at the facility prescribed medication to claimant and referred her to a chiropractor. At that time, claimant was experiencing only some discomfort due to her neck injury. Claimant's pain worsened during the evening and overnight.

(4) On Monday, September 30, 2013, although claimant was off work, she went to the workplace. The CEO and claimant's coworkers already knew about the car accident. The CEO's daughter drove claimant to arrange for a rental car and to take her damaged car to an automotive repair shop. At that point, claimant thought that she would be able to return to work on her next scheduled day, Tuesday, October 1, 2013.

(5) On Tuesday, October 1, 2013, claimant was in "severe pain." Audio at ~7:50. On that day, claimant called the CEO to report that she was going to be absent because she had a "severe headache" and was nauseous. Audio at ~7:50. Claimant described the automobile collision to the CEO and described in detail the various symptoms she was experiencing. In that conversation, claimant could not tell the CEO when she expected to be able to return to work because she had not yet been able to see her regular physician or the chiropractor. The CEO listened to claimant for "a while." Audio at ~8:16. The CEO then commented to claimant "it is what it is" and asked claimant to "turn in [her] key." Audio at ~8:25. Not knowing when claimant might be able to return to work, the CEO wanted claimant's key to provide to the temporary help she intended to arrange to cover claimant's position until claimant could return Claimant perceived that the CEO "turned very cold and unprofessional" during the October 1, 2013 telephone conversation. Audio at ~8:22. Based on her assessment of the CEO's demeanor during the call, and the request that she bring in her key, claimant concluded that the CEO had discharged her. At no time did the CEO tell claimant she was "discharged" or "fired" or make any similar statements. Audio at ~13:25, ~25:08. Claimant did not ask the CEO if she intended to discharge her or to explain why she had asked for claimant's key.

(6) On October 4, 2013, claimant saw the chiropractor to whom the urgent care physician had referred her. The chiropractor gave claimant a "disability note" for the employer. Audio at ~9:33. At that time, claimant was not physically able to return to work. Audio at ~14:50. Sometime between approximately October 4, 2013 and approximately October 13, 2013, claimant also consulted with an attorney to represent her in making a claim for her damages arising from the automobile accident, including claimant's lost income as well as filing a "disability" claim for her injuries. Audio at ~17:73. The attorney advised claimant not to communicate with any representatives of the employer. Thereafter, claimant did not attempt to contact the employer or the CEO. Sometime around approximately October 13, 2013, claimant's attorney contacted the CEO to obtain information about the number of work days claimant had missed to support claimant's disability claim. Audio at ~17:73, ~26:06. The CEO told the attorney that claimant had "just disappeared" from the workplace after the September 29, 2013 automobile accident. Audio at ~18:06. The CEO completed and faxed back the paperwork that the attorney had requested. As a result of the CEO's statement that claimant had "disappeared," claimant's disability claim was denied. At around this time, the CEO arranged for a temporary worker to assume claimant's job duties until claimant was able to return to work, and that temporary worker stayed for six months, during which time claimant did not return to work. Sometime after October 13, 2013, claimant filed a claim for unemployment benefits.

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

The first issue this case presents is the nature of claimant's work separation. If the claimant could have continued to work for the employer for an additional period of time, the work separation was a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If claimant was willing to continue to work for the

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).

The parties disagreed on the majority of the facts surrounding the work separation, with claimant reciting in detail an alleged telephone conversation on October 1, 2013 in which she contended that the CEO discharged her and the CEO taking the position that the conversation did not occur and that claimant simply stopped reporting for work without explanation. Audio at ~7:50, ~22:38, ~25:08, ~30:09. The evidentiary disagreement is irreconcilable. Out of an abundance of caution, since it is claimant's disqualification from benefits that is at issue in this work separation, we have accepted claimant's account of that conversation for purposes of this analysis.

Although on their face the statements that claimant attributed to the CEO during the October 1, 2013 phone conversation were, at best, ambiguous as to the CEO's intention about continuing or not continuing the employment relationship, claimant was adamant that there was "no doubt in [her] mind" that the CEO intended to discharge her by those statements. Audio at ~30:30. While claimant supported this inference by the alleged further fact and that the CEO often spoke ambiguously about discharging an employee before the CEO then delegated the actual task of discharge to another employee, claimant did not assert that any other employee later told her that she was, in fact, discharged. Audio at ~13:13. As claimant described the context, since the CEO's statements were not followed up by a communication from another employee severing the work relationship, the CEO's habitual practice surrounding a discharge does not provide any insight into what the CEO's intended when she made the ambiguous statements that she did on October 1, 2013. Claimant's further contention, that the CEO's failure to communicate with her after October 1, 2013 corroborated that the CEO had discharged her on October 1, 2013, also does not clarify the CEO's intention during the October 1, 2013 conversation. Immediately before the CEO made the alleged statements of discharge, claimant testified that she had detailed the severity of the automobile collision and the severity of her injuries, told the CEO that she was not able to report for work and, because she had not yet seen her treating physicians, could not provide any estimate of when she likely was able to return to work. Audio at ~7:50; ~9:02, ~11:57. The CEO's failure to communicate with claimant after October 1, 2013, was as likely an attempt to allow claimant an uninterrupted convalescence at home as it was an expression that the CEO had severed the work relationship. Against this backdrop, it also quite plausible that the CEO statement, "it is what it is," was simply an acknowledgement that claimant's need to be absent was beyond the control of either one of them, and that the CEO's further statement, asking claimant to bring in her key, was intended only to facilitate arrangements to obtain coverage for claimant's position during the uncertain period of time that she needed to recover from her injuries. Given the ambiguity of the statements that claimant contended that the CEO made, the record does not show that the CEO, more likely than not, objectively intended to discharge claimant by the statements that she made on October 1, 2013. Although claimant might have misunderstood the CEO's intentions, claimant nonetheless objectively manifested an unwillingness to work when she failed to return to the workplace after October 1, 2013 and stopped communicating with the employer or the CEO. Claimant's work separation was a voluntary leaving. Whether or not the nature of claimant's misunderstanding disqualifies her from benefits must be addressed under the principles applicable to a voluntary leaving of work.

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.

For the reasons addressed in the above discussion on the nature of the work separation, claimant's position that a reasonable and prudent person would have interpreted the CEO's statements on October 1, 2013 as words of discharge, rather than an acknowledgement of a difficult situation of uncertain duration is not persuasive. This is particularly so since claimant herself asserted that up to that point she thought that she had a good working relationship with the CEO and that the CEO had always been "patient" about her absences from work. Audio at ~7:50, ~15:17. EAB has consistently held that a claimant's mistaken belief about an employer's intention to sever the work relationship based on ambiguous statements or circumstances is not a situation of such objective gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have concluded that she had a grave reason to leave work. Rather, a reasonable and prudent person in those circumstances would not have concluded that she needed to leave work until clarifying whether the CEO had actually intended to discharge her by her statements. *See Gary L. Reisen* (Employment Appeals Board, 11-AB-2392, October 10, 2011) (claimant who assumed, without confirming that he was fired when, after an argument, his manager told him to "get out" did not have good cause to quit work because manager's statement was ambiguous); *Joshua A. Smith* (Employment Appeals Board, 11-AB-0702, March 15, 2011) (claimant who assumed without clarifying that he was fired when told "to leave the kitchen" did not have good cause to quit work because statement was ambiguous); *Joyce R. Gregson* (Employment Appeals Board, 10-AB-4105, January 25, 2011) (claimant who assumed, without confirming, that employer's failure to return her calls meant that she was fired had quit work without good cause because employer's lack of action was an ambiguous expression of intention); *Samantha M. Knauss* (Employment Appeals Board, 10-AB03931, January 14, 2011) (claimant who assumed, without confirming, that she was discharged when, after calling in sick, her manager told her "no, just don't come in" quit work without good cause because statement was an ambiguous statement of intention); *Cliff D. Hoover* (Employment Appeals Board, 10-AB-1790, July 22, 2010) (claimant who assumed, without confirming, that he was discharged when owner said "it's not working out" and "we should probably go our separate ways" quit work without good cause because owner's statements were ambiguous); *Chantel M. Dominguez* (Employment Appeals Board, 09-AB-2465, August 18, 2009) (claimant who assumed, without confirming, that she was fired based on employer's statement to her to "do what you gotta do" quit work without good cause because employer's statement was ambiguous).

On the facts in this record, claimant did not meet her burden to demonstrate that she had good cause to leave work when she did. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 14-UI-26731 is affirmed.

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

DATE of Service: <u>December 16, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.