

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1849

Affirmed
Disqualification

PROCEDURAL HISTORY: On September 30, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause and claimant was overpaid \$512 in benefits (decision # 143836). Claimant filed a timely request for hearing. On November 7, 2014, ALJ Lohr conducted a hearing at which the Employment Department did not appear, and on November 14, 2014 issued Hearing Decision 14-UI-28708, affirming the Department's decision and admitting Exhibit 1 into evidence on her own initiative, subject to either participating party filing an objection within five days of the mailing of the hearing decision. On November 19, 2014, claimant filed a timely written objection to Exhibit 1. On November 25, 2014, ALJ Lohr issued a letter ruling overruling claimant's objection on the ground that Exhibit 1 was necessary to fully and fairly complete the hearing record. On December 4, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which, among other things, she renewed her objection to the admission of Exhibit 1 into the hearing record, appeared to challenge the ALJ's decision not to admit documents that she offered as exhibits at the hearing and offered new information in the form of a wage statement. Claimant's Written Argument at 1, 2. The documents that the Department provided and which became Exhibit 1 were discussed during the hearing, and claimant did not state or suggest that she had not received copies of them from the Department before the hearing. Audio at ~5:09, ~5:36. While claimant contended in her argument that a copy of Exhibit 1 was not attached to the hearing decision, she did not contend that the Department's attestation to Exhibit 1 was false and that the Department did not mail to her a copy of the documents comprising Exhibit 1 on October 27, 2014 or that she did not receive them, which the ALJ noted as one ground for admitting that exhibit into evidence. November 25, 2014 Letter Ruling at 1. Nor did claimant contend in her argument or at hearing that any of the information contained in Exhibit was false or that she had not received \$512 in benefits after the work separation. Because claimant did not show legally cognizable prejudice from the admission of Exhibit 1, the documents in Exhibit 1 were accompanied by an attestation of accuracy from an authorized Department representative, and the information contained in Exhibit 1 was necessary for a full and fair consideration of the issues raised during the hearing, the ALJ did not abuse her discretion in admitting

that exhibit on her own motion and overruling claimant's objection. *See* OAR 471-040-0023(5) (August 1, 2004).

While claimant might have wanted the documents that she offered at hearing to be admitted into evidence, she agreed that some of them were not relevant to the hearing issues. Audio at ~40:13. The balance of the documents that claimant offered was her written narrative of the events relevant to her work separation. Claimant testified at length about those events during the hearing, and claimant did not suggest in her written argument that, for some reason, her hearing testimony was not an adequate account or that she was otherwise prejudiced by the failure of the ALJ to admit those documents into the hearing record. The ALJ did not abuse her discretion in excluding these documents from evidence. With respect to the wage statement that accompanied claimant's written argument, the relevance of this new information to the hearing issues is not clear. In addition, claimant did not explain or otherwise show that factors or circumstances beyond her reasonable control prevented her from offering this new information during the hearing as required by OAR 471-041-0090(2) (October 29, 2006). EAB did not consider this new information when reaching this decision. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) Sometime before February 13, 2014, claimant registered with the Department of Human Services' (DHS) registry of home healthcare workers to provide live-in caregiver services to eligible DHS clients. After registering, claimant received training in which she was instructed that if she had difficulties working with a client, she was expected to discuss and seek a resolution from the client, the client's representative or the client's DHS case manager.

(2) On February 13, 2014, the "power of attorney" for a disabled man hired claimant as a live-in caregiver through the DHS caregiver registry. When she was hired, claimant understood that the man was paralyzed from the waist down, that she was going to have control of the residence in which the man lived, and that an unpleasant animal odor in the residence was a result of a dog that a previous caregiver owned and brought into the residence. Claimant moved into the residence.

(3) Soon after February 13, 2014, claimant cleaned the disabled man's residence and eliminated the bad odor. Sometime later, claimant realized that the disabled man's power of attorney often visited the residence. Claimant thought that the power of attorney treated the disabled man's residence as her "annex." Audio at ~30:09. Claimant resented that the power of attorney did not allow her to control the activities in the residence. Also sometime later, claimant also came to the conclusion that she and the disabled man did not "mesh." Audio at ~13:16. Claimant did not get along with him or the power of attorney. Claimant did not like working for the disabled man and the power of attorney.

(4) After February 13, 2014, the caregiver who relieved claimant sometimes missed her shifts and claimant covered them. Claimant resented doing so and complained about it to the disabled man's DHS case manager. Audio at ~21:24. Sometime after February 13, 2014, the relief caregiver brought her puppy into the residence when she worked. Claimant disliked the presence of the puppy in the residence and the puppy sometime urinated or defecated in the residence. Claimant called the disabled man's DHS caseworker to complain about the puppy. Audio at ~ 20:05. The caseworker told claimant that she was not going to ban the puppy from the residence and suggested that claimant speak with the power of attorney about the puppy. Claimant never called the case manager to speak about any other concerns she had about her working conditions, including her working relationship with the disabled man or the power of attorney. Audio at ~22:42.

(5) Sometime after February 13, 2014, a guest who was staying in the residence stole some items from claimant's room. Claimant complained to the power of attorney. The power of attorney gave claimant a lock to install on the door to her room.

(6) Sometime in approximately May 2014, a physical therapist who was treating the disabled man prescribed an exercise where he stood each day at a standing bar and brought to the residence the necessary equipment. Based on his apparent ability to stand, claimant thought that the power of attorney had lied to her when she told her that the man was paralyzed from the waist down. When the physical therapist instructed claimant and the relief caregiver about transferring the disabled man to the standing bar, she told them that two people should move the man into position at the bar and that one person should not perform the transfer alone. Claimant spoke to the power of attorney about the physical therapist's comment. The power of attorney did not arrange for a person in addition to the caregiver on shift to perform the daily transfer.

(7) Sometime in early June 2014, claimant arranged to take two days off, one was claimant's birthday and the other was to enable claimant to visit her elderly father. The relief caregiver did not show up on those days and claimant covered those shifts. Audio at ~32:17.

(8) By early June 2014, claimant thought that her working relationship with the disabled man and the power of attorney was so poor that the power of attorney was looking for another caregiver to replace her. In early to mid-June 2014, claimant had a conversation with the power of attorney in which they both discussed their dissatisfactions with the employment relationship. During the conversation, the power of attorney "hemmed and hawed." Audio at ~16:44. As a result of this conversation, claimant concluded that both she and the power of attorney reached a "mutual understanding," "a mutual thing," "a mutual decision" and a "very mutual separation [as of June 17, 2014]." Audio at ~13:16, ~26:29, ~28:23, ~43:24; Exhibit 1 at 12. During this conversation, the power of attorney never told claimant that she was discharged or used similar words. Audio at ~14:53. Sometime after their conversation, both claimant and the power of attorney indicated to the DHS case manager that claimant left by "mutual agreement." Exhibit 1 at 10, 12.

(9) After June 17, 2014, claimant did not return to work. Claimant voluntarily left work on that day.

(10) On August 22, 2014, claimant filed an initial claim for unemployment insurance benefits. At the time she filed her claim, claimant reported to the Department that the reason for the work separation was "lack of work." Audio at ~16:37; Exhibit 1 at 6, 7. Claimant's claim was valid with a weekly benefit amount of \$128. Exhibit 1 at 6.

(11) For each of the weeks of August 24, 2014 through September 20, 2014 (weeks 35-14 through 38-14), claimant claimed, and was paid, \$128 in benefits. Exhibit 1 at 14. In total, claimant was paid \$512 in benefits.

CONCLUSIONS AND REASONS: Claimant voluntarily left work without good cause. Claimant was overpaid \$512 in benefits which she is liable to repay or have deducted from future benefits otherwise payable to her.

The Nature of the Work Separation.

The first issue this case presents is the nature of claimant's work separation. If 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). When an employer and a claimant mutually agree that a work separation will occur and its date, the separation is treated as a voluntarily leaving and not a discharge. *See Employment Department v. Shurin*, 154 Or App 352, 356, 959 P2d 637 (1998).

Throughout the hearing, claimant characterized her work separation as the result of a mutual agreement she reached with the power of attorney. After the separation, claimant indicated to the DHS case manager the same thing, and told the Department's authorized representative on September 23, 2014 that the separation was a "mutual thing between me and the power of attorney." Exhibit 1 at 10, 12. While the manner in which claimant characterized the work separation is not dispositive, claimant's characterization of it does suggest that the power of attorney was not at any discernible point unwilling to allow claimant to continue working. This inference is supported by claimant's testimony that the power of attorney never used words traditionally associated with a discharge during the June 2014 conversation from which claimant concluded that a work separation had occurred. Audio at ~14:13. Claimant's description at hearing of the actual words used in the June 2014 conversation with the power of attorney is questionable. Audio at ~14:20. From that description, it not clear why claimant would ask the power of attorney if she should remove her personal items from storage and bring them to the residence unless they had already been discussing a possible work separation. Audio at ~14:20. It does not make sense why, if claimant's description of the conversation is accurate, she would conclude that the work separation was the result of a "mutual" agreement with the power of attorney rather than a discharge. *Id.* Nor is it likely that the power of attorney understood claimant's alleged reference in that conversation to a "terminal leave" to mean that claimant considered herself to have been discharged. Audio at ~14:53. The explanation of the work separation that most closely aligns with the facts claimant presented at hearing, and her characterization of it, was the one that she provided to the authorized representative when she stated that she could not recall how the matter of a work separation first came up, that it was a "mutual thing," and that, although she had ultimately agreed that she would remain working until the end of July 2014 to allow the power of attorney to hire a replacement caregiver, they both agreed that her last day would be earlier, on June 17, 2014, after the relief caregiver did not show up for her scheduled shift. Exhibit 1 at 12. The preponderance of the reliable evidence is that claimant and the power of attorney discussed that the work relationship was not working out in early or mid-June 2014, both agreed to the severance of the employment relationship and both agreed, after some negotiation, to the date that ultimately was claimant's final day. Applying the principles in *Shurin*, claimant's work separation was a voluntary leaving on June 17, 2014.

Good Cause For Leaving.

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.

Claimant initially testified that she left work because she and the power of attorney agreed that she was not a "mesh" for the position and her continued employment was not "conducive to the overall well-being" of the disabled man. Audio at ~13:16. What precisely claimant meant by this statement is not apparent. How these amorphous factors caused claimant, herself, to confront objectively grave circumstances also is not obvious. Absent specific evidence supporting the gravity of claimant's situation, claimant has not met her burden to show that this was a grave reason requiring her to quit work.

Claimant also presented many disparate complaints about her work situation to show that she was justified in leaving work. The most compelling of these complaints was claimant's contention that the power of attorney required her and the relief caregiver to transfer the disabled man to the standing bar in an unsafe manner after being informed of the hazards. Audio at 24:57. It is implausible that the situation was as dangerous as claimant implied since, if it was, she likely would have either immediately quit work or immediately notified the physical therapist and the disabled man's case manager that she was being required to subject the disabled man to possible physical harm. Claimant did not testify that she did any of these things and presumably continued to work for the employer for at least an additional month. Since claimant did not hesitate to at least contact the case manager on other occasions when she was dissatisfied with the conditions of her work, claimant did not show, more likely than not, that the manner in which she was required to perform her work was potentially dangerous to the disabled man or that it constituted a grave reason for her to leave work.

Claimant's other complaints about her job also do not show the objective gravity necessary to establish good cause for leaving work. That claimant was under the initial impression that the disabled man did not have the physical capacity to stand, does not mean that the power of attorney's statements to claimant that he was paralyzed from the waist down was necessarily inaccurate, or that the task of transferring the disabled man to the standing bar was a grave reason to quit rather. That the relief caregiver sometimes did not show up to work her shift and claimant covered that shift understandably irritated claimant. However, claimant did not present specific evidence about how often that situation arose or that the power of attorney required her to provide that shift coverage, or that the extent of the disruption to claimant's planned activities on her scheduled time off somehow caused her grave harm. Without identifying any specific, serious harms to herself, that claimant was annoyed by the presence of the relief caregiver's puppy in the residence does not in and of itself suffice to establish a grave reason for leaving work. That claimant might have been under the initial impression she was going to be allowed to control the activities in the residence and became bothered when the power of attorney did not allow her unfettered authority to do so also does not, without more, establish a grave reason for leaving work. Finally, although claimant had some items stolen from her room, the power of attorney took apparently prompt steps to arrange for the installation of a lock on the door to the room. Claimant presented no evidence that this incident was repeated, that the problem of theft was ongoing or that it was a grave reason to leave work when she did. That the power of attorney asked claimant to install the lock herself, while that request might have been irritating to claimant, does not establish the level of cognizable harm needed to show an objectively grave reason to leave work. On the facts that claimant

presented, a reasonable and prudent caregiver, exercising ordinary common sense, while she might have been annoyed, complained to the power of attorney or the DHS case manager, or began seeking other work, would not have concluded that they were grave reasons to leave work. Claimant did not show good cause for leaving work when she did and is disqualified from receiving benefits based on her June 17, 2014 work separation.

The Overpayment.

ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable either to repay the benefits or have the amount of the overpaid benefits deducted from any future benefits otherwise payable to the individual under ORS chapter 657. That provision applies if the benefits were received because the individual made or caused to be made a false statement or misrepresentation of a material fact, or failed to disclose a material fact, regardless of the individual's knowledge or intent. *Id.*

It is undisputed that claimant received \$512 in benefits for weeks 35-14 through 38-14, which were after her June 17, 2014 work separation. It is also not disputed that claimant would not have received those benefits absent her representation to the Department's representative that she was laid off due to "lack of work." Audio at ~ 16:10, Exhibit 1 at 7. As matter of law, claimant's work separation was caused by a voluntary leaving and the statement that she made to the Department representative about the reason for the separation was also false as a matter of law. Although claimant testified at hearing that the reason she gave for the work separation was based on information she received during her DHS training as a caregiver, it is enough to establish claimant's repayment responsibility that she made a false statement, whatever its cause, and received benefits to which she was not entitled. Audio at ~16:10. Because claimant received benefits to which she was not entitled, claimant is required either to repay the \$512 in overpaid benefits or to have that \$512 deducted from any future benefits otherwise payable to her.

DECISION: Hearing Decision 14-UI-28706 is affirmed.

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

DATE of Service: January 20, 2015

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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