

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0119

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit work without good cause (decision # 84308). Claimant filed a timely request for hearing. On January 23, 2015, ALJ S. Lee conducted a telephone hearing, and on January 30, 2015 issued Hearing Decision 15-UI-32700, concluding the employer discharged claimant, not for misconduct. On February 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument. In its argument, the employer asked EAB to reopen the January 23, 2015 hearing, asserting that the ALJ erred in excluding its exhibit (Exhibit 1). The employer's request is construed as a request for EAB to remand this matter to the Office of Administrative Hearings (OAH) for another hearing due to the ALJ's alleged error in excluding Exhibit 1.

Prior to commencement of an evidentiary hearing that is held by telephone, each party must provide to all other parties and the ALJ copies of documentary evidence that it will seek to introduce into the record. OAR 471-040-0023(4) (August 1, 2004). Irrelevant, immaterial, or unduly repetitious evidence shall be excluded but erroneous rulings on evidence shall not preclude the administrative law judge from entering a decision unless shown to have substantially prejudiced the rights of a party. OAR 471-040-0025(5) (August 1, 2004).

In its argument, the employer asserted that it provided a copy of Exhibit 1, which included a two-page statement from claimant's manager, to the ALJ on January 19, 2015, and the "exact same documents" to claimant on January 20, 2015. Employer's Written Argument at 1. However, the copy of Exhibit 1 provided to the ALJ does not include a statement from claimant's manager. Exhibit 1. Nor does the record show that the copy provided to claimant included such a statement. The ALJ therefore did not err in excluding the manager's statement from the hearing record, given the employer's failure to provide a copy of the document to claimant and the ALJ prior to the hearing, as required under OAR 471-040-0023(4).

The copy of Exhibit 1 provided to the ALJ, which we infer was provided to claimant, consists of documents showing claimant's pay during 2014, and that of two of the employer's account executives during the same period. In Hearing Decision 15-UI-32700, the ALJ stated that Exhibit 1 was not received into the hearing record, in part, because it was not relevant to the facts at issue, and duplicated testimony given at hearing.¹ We agree that the documents showing claimant's and the account executives' pay during 2014 are not relevant and material to whether claimant is disqualified from receiving benefits based on his work separation from the employer. We also agree that the documents showing claimant's pay during 2014 duplicated the employer's witness' testimony on that issue. *See* Transcript at 26-32. Nor does the record show the ALJ prevented the employer's witness from testifying regarding the contents of the documents showing the account executives' pay during the same period. The record therefore fails to show the ALJ erred in excluding the documents showing claimant's and the account executives' pay during 2014, let alone that any such error prejudiced the rights of the employer.

The employer's request for EAB to remand this matter to OAH for another hearing therefore is denied.

FINDINGS OF FACT: (1) International Profit Association Inc. employed claimant as a senior executive and behavior specialist from October 17, 2005 to October 31, 2014.

(2) Claimant lived and worked for the employer in Newport, Oregon, remotely managing a team of outside sales representatives. The employer was located in Illinois, where the employer's account executives were forwarded calls and received leads from other employees regarding potential clients. The account executives telephoned the potential clients and attempted to schedule in-person meetings with the employer's outside sales representatives. The outside sales representatives traveled to major cities throughout the year, meeting with potential customers for approximately three weeks in each city. Claimant followed up with the potential clients after their in-person meetings with the outside sales representatives, and completed behavioral profiles of customers.

(3) Account executives and outside sales representatives worked largely, or entirely, on commission. Prior to June 2014, the employer paid claimant a base salary, plus commission on the sales of the outside sales representatives he managed. In June 2014, the employer stopped paying claimant a base salary because it was dissatisfied with his job performance.

(4) As of October 31, 2014, the employer was no longer willing to allow claimant to continue working as a senior executive and behavior specialist because of its dissatisfaction with his job performance. Claimant's manager told him he could continue working for the employer as an account executive. Claimant had no training or experience working as an account executive, and would not be in Illinois to be forwarded calls and receive leads from other employees regarding potential clients. Claimant therefore declined to work for the employer as an account manager.

(5) Claimant's manager told him his only other options was to work for the employer as an outside sales person, but indicated that claimant would have to find his own potential clients and set up his own in-

¹ Hearing Decision 15-UI-32700 at 1.

person meetings. Claimant had no training or experience working as an outside sales representative, and therefore declined the position.

CONCLUSIONS AND REASONS: We disagree with the ALJ's conclusion that the employer discharged claimant. However, we conclude that claimant quit work with good cause.

The first issue in this case is the nature of the work separation. 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) (August 3, 2011). If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from when the employer-employee relationship is severed. *Id.*

In Hearing Decision 15-UI-32700, the ALJ found as fact that as of October 31, 2014, "the employer was ending claimant's position with the employer," but that claimant's manager told him that he "could take an outside sales position," and that "claimant declined."² In determining the nature of the work separation, the ALJ acknowledged that claimant admitted his manager told him he could continue working for employer as an outside sales representative, but the ALJ nevertheless concluded that the employer discharged claimant. However, the ALJ's own findings show that the employer allowed claimant to continue working for the employer as an outside sales representative, but claimant was unwilling to do so. The record shows that the employer also allowed claimant to continue working for the employer as an account executive, but claimant was unwilling to do so. Exhibit 2. Because claimant could have continued to work for the employer in either capacity, the work separation is a quit, and not a discharge.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he 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). 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 his employer for an additional period of time.

Claimant quit work because he was unwilling to work for the employer as an account executive or outside sales representative. At hearing, claimant testified that the account executive position was not suitable for him because he had no training or experience in cold calling, telemarketing or appointment setting, and that it would be impossible for him to perform those duties from Newport because he would not be forwarded calls or received leads from other employees Transcript at 50-52. Claimant similarly testified that he had no training or experience as an outside sales representative, and could not succeed in that position without the support that other outside sales representatives received in finding and scheduling in-person meetings with potential clients. Transcript at 17-18. Claimant's testimony showed that working for the employer as an account executive or outside sales representative was not a

² *Id.* at 2.

reasonable alternative to quitting. We therefore conclude that claimant quit work with good cause. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

DECISION: Hearing Decision 15-UI-32700 is affirmed.

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

DATE of Service: March 23, 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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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