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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
2015-EAB-0258

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 6, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 12446). Claimant filed a timely request for hearing. On February 23, 2015, ALJ Shoemake conducted a hearing, and on February 26, 2015 issued Hearing Decision 15-UI-34202, affirming the Department's decision. On March 10, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she presented new factual information speculating about the reason that the employer decided to contest the manner in which claimant had characterized the work separation when she applied for benefits. Because it was not disputed that, in a discussion with claimant after she submitted her notice of resignation, the employer's owner agreed to characterize the separation as a "lay off" rather than a voluntarily leaving, the reason that he ultimately decided to report the correct facts to the Department is not relevant to the issues before EAB. Under OAR 471-041-0090(2) (October 6, 2006), EAB did not consider the new information that claimant offered. EAB considered only information received into evidence at the hearing when reaching this decision. EAB otherwise considered the legal arguments put forward in claimant's written argument.

FINDINGS OF FACT: (1) Salem Fitness Center employed claimant as its manager from February 4, 2005 until March 30, 2014.

(2) Claimant was very committed to her job. She was very concerned about the well-being of the employer, her coworkers and the members of the employer's gym.

(3) Before March 2014, the employer's gym was losing members because a new gym had opened nearby. Claimant and the employer's owner disagreed about how best to retain the gym's current membership.

(4) On approximately March 7, 2014, claimant and the owner again discussed and disagreed about appropriate actions to maintain the gym's membership. Claimant offered to loan her personal funds to the employer so it could upgrade its facility in an effort to compete effectively with the new gym. Claimant also told the owner that she had her coworkers were very concerned that they might lose their jobs if the employer was unable to halt the loss of members. The owner told claimant that she did not "have anything invested in this place and [she] could leave whenever [she] wanted to." Audio at ~11:26. The owner's comment upset claimant and she began crying. Claimant left the gym. Claimant later called the owner and asked if he wanted her to come back to work. The owner told claimant that "it was up to [her]." Audio at ~13:06. Claimant returned to work and continued to report for her scheduled shifts thereafter.

(5) After the March 7, 2014 conversation with the owner, claimant perceived that there was a great deal of tension between her and the owner about retaining the gym's membership. During this time, claimant told the owner that she had been very hurt by his comment that she had no investment in the gym. The owner did not respond in a way that claimant thought eased the tension between them. Claimant continued to feel "very uncomfortable" at work. Audio at ~14:53.

(6) By March 14, 2014, claimant decided to quit work because of the tension and discomfort she perceived in the workplace. On Friday, March 14, 2014, near the end of her shift, claimant left a note on the owner's desk stating that she was quitting work in two weeks, on March 30, 2014. In that note, claimant stated that she would do whatever the owner needed her to do to train her replacements. Audio at ~8:42. As claimant was leaving that day at the end of her shift, the owner arrived and encountered her at the door. The owner did not customarily come into work on Fridays. Claimant told the owner that she had left a written resignation on his desk giving her two week notice. Audio at ~15:10. The owner said to claimant, "That's why I'm here." Audio at ~23:15, ~25:05. The owner did not tell claimant that she was "fired" or "discharged." Audio at ~35:12.

(7) After March 14, 2014, claimant trained the employees that the owner had selected to replace her in the position of gym manager and continued to report for work. Sometime during the week of March 17, 2014 through March 22, 2014, claimant met with the employer's owner to discuss her resignation. In that conversation, claimant asked the owner if he would agree to characterize the events that led to her leaving as a "lay-off" and he said that he would. Audio at ~16:36, ~27:49, ~30:48. Claimant also offered to be available to the employer after she left work to assist her replacements if they needed help. Audio at ~16:36.

(8) On March 28, 2014, claimant's last scheduled work day before March 30, 2014, claimant reported for work and completed her shift. After that day, claimant did not report to work as the employer's manager. Claimant voluntarily left work on March 30, 2014. On April 7, 2014, claimant went to the workplace on that single day to help her replacements prepare the employer's payroll.

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 claimant could have continued to work for the same 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 same employer for an additional period of time but was not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b).

The facts surrounding the work separation are not in substantial dispute. Both parties agreed that claimant left her resignation note on the desk of the employer's owner before he arrived at the workplace on March 14, 2014, and claimant told the owner that she had done so before he said anything to her about anything. While claimant contended that, after she had told the owner that she was resigning, he agreed that he had arrived at the workplace when he did in order to discharge her, that contention, if accepted, still would not change the work separation to an involuntary discharge. Audio at ~15:21. On these facts, claimant was the first party to express the intention to sever the employment relationship, making it a voluntary leaving. Moreover, even if the expression of the employer's intention to discharge claimant had been simultaneous with claimant's expression of her intention to quit effective March 30, 2014, such a situation is best characterized as the mutual agreement of the parties to end the employment relationship on March 30, 2014, since it is not disputed that claimant was allowed to continue working after she gave her notice on March 14, 2014 up until the date she planned to leave. When both the employer and claimant have agreed on a mutually acceptable date on which the employer will terminate, the work separation is treated as a voluntary leaving and not as a discharge. *Employment Department v. Shurin,* 154 Or App 352, 356, 959 P2d 637 (1998) (and cases cited therein). On these facts, claimant's work separation was a voluntary leaving on March 30, 2014.

Claimant argued at hearing and in her written argument that her agreement to be available to the employer to assist her replacements after she left work, meant that she was "pretty much on retainer" to the employer after March 30, 2014 and that she did not actually quit work on March 30, 2014. Audio at ~36:00; Claimant's Written Argument at 4-5. Since it is not disputed that claimant stopped reporting for regular work as she planned after her last shift on March 28, 2014, it is not clear how her unilateral statement that she would be available to help her replacements after she had resigned, and her doing so for part of one day a week after she had otherwise quit, transformed her voluntary leaving on March 30, 2014 to a discharge on some unspecified later day. There was no evidence in the record suggesting that claimant expected to perform regularly scheduled work after March 30, 2014 or that the employer had agreed to rescind her resignation, and her agreement to provide help, if needed, was, at best, a statement that she was willing to work for the employer after she quit on a casual or ad-hoc basis. Such willingness does not operate to resuscitate the original work relationship beyond the planned ending date of March 30, 2014. It only means that, despite her leaving, claimant was willing to provide in the future some limited, temporary assistance to the employer at some uncertain future time and on some basis other than as a regular employee.

In claimant's written argument, she also argued based on several legal theories that the employer was precluded from supplying correct information to the Department about the circumstances of the work separation because, after claimant had already severed the employment relationship, the employer's owner agreed to characterize it as an involuntary lay-off. Claimant's Written Argument at 1, 3-5. In essence, claimant is arguing that the owner was required to supply fraudulent information about the work separation to the Department because the owner made an ill-advised statement to claimant that he

would do so. EAB has consistently held that an agreement between the parties about how they will characterize a work separation is not dispositive and cannot bind the Department or the ALJ from adjudicating the work separation based on the facts surrounding it as disclosed at the hearing. *See Scottie L. Crocker* (Employment Appeals Board, 2104-EAB-1849, January 15, 2015); *Gary G. Goodroad* (Employment Appeals Board, 2014-EAB-1350, September 17, 2014); *Linda McCarthy* (Employment Appeals Board, 2013-EAB-2078, November 5, 2013); *Stephanie J. Green* (Employment Appeals Board, 12-AB-3349, January 25, 2013).

Claimant also contended that she relied to her detriment when she applied for unemployment benefits that the employer's owner would mischaracterize the nature of the work separation as a lay off and that the employer was thereby estopped from presenting accurate facts about the work separation. Claimant's Written Argument at 4, 6. Claimant's main complaint, stripped of its rhetoric, appears to be that the owner was unwilling to collude with her to misrepresent the true facts of the work separation to the Department and unwilling to violate its statutory obligation to provide honest information to the Department about her eligibility for benefits. *See* ORS 657.300. We are unwilling to apply the doctrine of estoppel to enforce a purported agreement that violates the law and would allow claimant to receive benefits to which she is not entitled based on the circumstances of the work separation. Even if we were persuaded that the owner understood and agreed to commit a fraud against the Department, claimant cannot show that the Department agreed to accept claimant and the employer's characterization of the work separation when it made its decision about whether claimant was or was not disqualified from benefits. The Department was not a party to the purported agreement and did not even arguably relinquish its authority to determine the true nature of claimant's work separation based on the facts surrounding the work separation. While claimant couched her argument in terms of estopping the employer from contesting the nature of the work separation, she is actually contending that it is the Department who is estopped from correctly adjudicating the work separation. Claimant's arguments do not provide a colorable basis for establishing the type of estoppel or preclusion that she is seeking. Based on the facts in the record, claimant's work separation was a voluntarily leaving on March 30, 2014

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 left work when she did because she was upset about the owner's comment that she had nothing invested in the company, and she perceived a great deal tension between herself and the owner. While the owner's statement might have hurt claimant's feelings and she might have felt some discomfort in the workplace as a result of it, nothing she described about it or the surrounding events shows a situation so grave that she had no alternative other than to leave work. Based on the owner's behavior as claimant described it, and his statements to her, claimant did not show good cause for leaving work when she did.

As a final matter, much of claimant's written argument was directed toward an obtaining a ruling from EAB that the Department is precluded from assessing an overpayment against claimant based on a disqualifying work separation, either because of the employer's alleged negligence or bad faith in reporting the true facts of the separation to the Department or because under ORS 657.410(10), the employer, and not claimant, should be required to repay the amount of any assessed overpayment to the Department. Claimant's Written Argument at 5-9. EAB's authority is limited to reviewing the decisions of ALJs after a party has requested a hearing or sought other review of an administrative decision. *See* ORS 657.275. No administrative decision has yet assessed an overpayment based on Hearing Decision 15-UI-34202 and there has been no hearing on such a decision. EAB does not have the authority to issue advisory or declaratory rulings to the Department or to the Office of Administrative Hearings (OAH), or to pre-empt the administrative or adjudicatory processes of either entity. Since there is no administrative decision and no hearing decision on the matter of any overpayment to claimant, the matter is not ready for review by EAB and EAB will not consider an overpayment that has yet to be assessed.

Claimant did not show good cause for leaving work when she did. Claimant is disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 15-UI-34202 is affirmed.

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

DATE of Service: <u>May 4, 2015</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 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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