

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0518-R-R

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On April 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 131436). Claimant filed a timely request for hearing. On May 21, 2015, the Office of Administrative Hearings (OAH) mailed the parties notice of a hearing scheduled for June 4, 2015. On June 4, 2015, ALJ Murdock conducted a hearing at which claimant failed to appear, and issued Hearing Decision 15-UI-39530, dismissing claimant's request for hearing for failure to appear. On June 24, 2015, claimant filed a request to reopen the hearing. On July 20, 2015, ALJ Holmes-Swanson conducted a hearing, and on July 23, 2015 issued Hearing Decision 15-UI-41914, allowing claimant's request to reopen and concluding claimant voluntarily left work without good cause. On July 29, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

On September 9, 2015, EAB issued Appeals Board Decision 2015-EAB-0518, affirming Hearing Decision 15-UI-41914. Claimant timely filed a Petition for Judicial Review of Appeals Board Decision 2015-EAB-0518 with the Oregon Court of Appeals (CA A160405). On March 1, 2017, the Oregon Court of Appeals issued *Kay v. Employment Dept.*,¹ reversing Appeals Board Decision 2015-EAB-0518 and remanding the case to EAB. On April 17, 2017, the Oregon Court of Appeals issued the appellate judgment. See ORAP 14.05(2)(b). On May 1, 2017, EAB issued Appeals Board Decision 2015-EAB-0518-R, adopting the portion of Hearing Decision 15-UI-41914 that allowed claimant's request to reopen, and affirming the ALJ's conclusion that claimant voluntarily left work without good cause. Claimant timely filed a Petition for Judicial Review of Appeals Board Decision 2015-EAB-0518 with the Oregon Court of Appeals (CA A164963). On July 5, 2018, the Oregon Court of Appeals issued *Kay*

¹ *Kay v. Employment Dept.*, 284 Or App 167, ___ P3d ___ (2017).

v. Employment Dept. (Kay II),² reversing Appeals Board Decision 2015-EAB-0518 and remanding the case to EAB. On August 27, 2018, the Oregon Court of Appeals issued the appellate judgment. See ORAP 14.05(2)(b).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis in Hearing Decision 15-UI-41914 with respect to the conclusion that claimant demonstrated good cause to reopen the hearing is **adopted**.

FINDINGS OF FACT: (1) Salmon River Contractors employed claimant as an office manager from July 22, 2011 until January 24, 2015.

(2) In April 2014, the employer discharged claimant's husband, who had been working as a truck driver for the employer.

(3) Some time prior to January 20, 2015, the employer's owner accused claimant of engaging in activities that "cost [the employer] all this money." Claimant met with the employer's crew leader and estimator, and demonstrated that the accusations against her were false. Transcript at 20.

(4) During approximately the second week of January 2015, claimant learned that the employer's owner had told prospective employers that her husband "was a drug addict and that he tore up [the employer's] truck." Transcript at 15.

(5) Claimant experienced severe stress as a result of the statements the owner was making about her husband and believed the owner's negative remarks were preventing her husband from finding work. On January 20, 2015, claimant left work with a migraine headache that was caused by the stress she was experiencing. Claimant never returned to work for the employer.

(6) Prior to January 21, 2015, claimant regularly sent text messages to the owner if she was going to be absent from or late to work, or if she needed to leave the office on work-related business. From January 21 to 23, 2015, the owner sent claimant text messages and left her telephone messages, asking how claimant was feeling and when she was going to return to work. Claimant never responded to any of the owner's messages. Claimant spoke with the employer's estimator and crew leader each day from January 21 to 24 and talked with him about her dissatisfaction with the owner. Claimant never told the crew leader if she was going to return to work.

(7) On January 24, 2015, the owner sent claimant two text messages. The first text message stated, "You and me can talk all the shit you want, but I'm still 36 years old with a multi-million dollar company and you're not. Thanks so much for the sabotage you created when I've done nothing but help you [and your husband]. You are bad people, full of jealousy. It's sad. Thank you both." Transcript at 13. The second text message stated, "I need these files back in my office, and the rest of my files. I'm calling the police." Transcript at 13. Claimant would have returned to work for the employer had the employer not sent her the January 24 texts. Transcript at 12. The employer had continuing work available for claimant after January 24, 2015.

² *Kay v. Employment Dept. (Kay II)*, 292 Or App 700, ___ P.3d ___ (2018).

CONCLUSION AND REASONS: On reconsideration pursuant to *Kay v. Employment Dept.*, Hearing Decision 15-UI-41914 is modified. Claimant’s request to reopen the June 4, 2015 hearing is allowed; claimant is not disqualified from benefits based on her voluntary leaving from work.

On reconsideration, and for the reasons explained therein, the portion of Appeals Board Decision 2015-EAB-0518-R analyzing the nature of the work separation in this case and concluding that claimant voluntarily left work is hereby incorporated by reference and **adopted**.

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). 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. Where the gravity of the situation experienced by the individual results from her own deliberate actions, to determine whether good cause exists, the actions of the individual in creating the grave situation must be examined in accordance with the provisions of OAR 471-030-0038(4). OAR 471-030-0038(5)(f).

As the Court of Appeals noted in *Kay II*, EAB’s task on remand is limited. Having concluded in Appeals Board Decision 2015-EAB-0518-R that claimant left her employment after receiving hostile text messages from the employer’s owner that left her with no reasonable (*e.g.* non-futile) alternative to quitting work, there is no other conclusion supportable by substantial evidence and reason but that claimant quit work with good cause. On this record, and consistent with the Court of Appeals’ ruling in *Kay II*, claimant therefore may not be disqualified from receiving unemployment insurance benefits because of this work separation.

DECISION: Order No. 15-UI-41914 is modified, as outlined above.

J. S. Cromwell and D. P. Hettle;
S. Alba, not participating.

DATE of Service: September 24, 2018

NOTE: This decision modifies an order that denied benefits. Please note that payment of any benefits, if any are owed, may take from several days to two weeks for the Department to complete.

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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