

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0636**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work without good cause (decision # 74835). Claimant filed a timely request for hearing. On April 6, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for April 20, 2015.

On April 15, 2015, OAH issued a subpoena ordering Dr. Mathew Bauer to appear as a witness at the April 20 hearing, and also ordering Dr. Bauer to produce certain purchase orders and invoices for pickup by the claimant on April 17, 2015. On April 16, 2015, OAH issued a changed notice of hearing, changing the date of the hearing to May 6, 2015. By letter dated April 24, 2015, ALJ Seideman informed the parties that the subpoenaed documents had not been produced; he explained that if the documents were not immediately produced, “it will be up to the ALJ in the hearing to decide what to do and take appropriate action.”

On May 6, 2015, ALJ Frank conducted a hearing, and on May 14, 2015 issued Hearing Decision 15-UI-38491, affirming the administrative decision. On May 29, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

In her written argument, claimant provided information that was not offered into evidence at the hearing. Under OAR 471-041-0090 (October 29, 2009), EAB may consider new information if the party presenting the information shows that circumstances beyond its reasonable control prevented the party from offering the information at the hearing. Claimant asserted she was unable to present the evidence she wants EAB to consider at the hearing because the ALJ would not permit her to do so. In regard to the employer’s documents, which the ALJ marked as Exhibit 1, claimant asserted that they were emailed to her one hour before the hearing, and that the ALJ did not give her adequate time to read and respond to these materials. Written Argument at 10. Contrary to claimant’s assertion, however, the ALJ

acknowledged the late delivery of the documents that comprise Exhibit 1, and offered to postpone the hearing if claimant's attorney believed more time was needed to review these materials. After consulting with claimant, claimant's attorney agreed to proceed with the hearing and made no objection to the admission of Exhibit 1. Transcript at 12:38 and 12:45. In regard to the subpoena issued to Dr. Bauer, claimant contended that the ALJ never acknowledged that Dr. Bauer failed to appear at the hearing, and did not acknowledge that Dr. Bauer had failed to provide her with the documents he had been ordered to produce. Written Argument at 11. However, claimant never informed the ALJ that she had not received the subpoenaed documents and never asked the ALJ to take action to enforce the April 24 subpoena.<sup>1</sup> In regard to witnesses, claimant asserted that the ALJ refused to allow her to call three witnesses. Claimant never objected to the ALJ's failure to allow these witnesses to testify, however, even though two of the witnesses had called into the hearing. Transcript at 13:21. In regard to evidence regarding claimant's work environment prior to the date on which she resigned, claimant asserted that she was unable to present all the evidence she wished because the "ALJ would not allow testimony regarding what had 'happened in the past.' His myopic focus was on the final event, not what led up to it." Written Argument at 12. However, the record shows that the ALJ gave claimant two opportunities to present testimony on matters that he had not covered. Transcript at 12 and 31. Claimant thus failed to show that circumstances beyond her reasonable control, *i.e.*, the ALJ's refusal to allow her to present evidence at the hearing, prevented her from offering the information she now wants EAB to consider. Claimant's request to present new information is therefore denied, and we considered only evidence received into the record in reaching this decision.

Although the ALJ admitted Exhibit 2 into the hearing record, he neglected to mark it as an exhibit. Audio at 12:45. Because these documents were readily identifiable based on their description during the hearing, EAB has corrected this oversight and marked the appropriate documents as Exhibit 2.

**FINDINGS OF FACT:** (1) Aesthetic Advancement NW employed claimant as office manager from December 4, 2012 until February 5, 2015. The employer provided non-surgical procedures for facial sculpting and rejuvenation.

(2) At the time a patient made an appointment for treatment, the patient was required to read and agree to the employer's "Office Policies." One of these policies was that "[p]roducts for treatments are ordered per patient and therefore need to be paid for at the time the appointment is booked." Exhibit 1 at 13. Another policy explained that the patient had 24 hours to cancel a treatment appointment and receive a full refund of payment made to purchase products. After 24 hours, payment made to purchase products was non-refundable. *Id.*, Claimant's responsibilities included explaining these "Office Policies" to patients, and obtaining patients' signed consent to them.

(3) Claimant's job duties also included ordering products used for patient treatments. She discovered that contrary to the employer's policy, payment a patient made for products was not used only to buy products used for that patient's treatment. Instead, payments patients made for products were used to purchase whatever products were needed for all patient treatments. In January 2015, a patient and her mother arrived for their treatment appointments and discovered that the products needed for their treatments had not been ordered and were not available. Exhibit 1. Claimant was uncomfortable about the discrepancy between the employer's policy and its practice regarding the purchase of products, and

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<sup>1</sup> We note that the record contains no evidence of any subpoena issued to compel Dr. Bauer's presence at the May 6 hearing.

believed that the employer misrepresented its ordering process to patients. She attempted to talk with the owner about her concerns, but the owner was unwilling to discuss the subject or address the problem.

(4) On February 4, 2015, the employer's owner told claimant that the attorney representing the employer might call her to testify about the employer's ordering procedure and refund policy at an arbitration hearing scheduled for February 10, 2015. The arbitration resulted from a legal action brought by a patient against the employer. Claimant indicated to the owner that she was reluctant to testify. The owner asked that claimant not force the owner to subpoena her to appear at the hearing because it would cost the employer more money. Transcript at 6.

(5) On February 5, 2015, claimant voluntarily left work because she did not want to testify at the February 10 arbitration. Claimant believed that if she testified, she would have to explain the discrepancy between the employer's policy and practice in regard to product ordering. Because claimant believed that testimony about these matters would be harmful to the employer, she was afraid that the employer would take disciplinary action against her, up to and including discharge, for her testimony.

**CONCLUSION AND REASONS:** We agree with the ALJ that claimant voluntarily left work without good cause.

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 quit her job because she was unwilling to testify at an arbitration hearing. Claimant believed her testimony would require her to explain the employer's policy and practice regarding products ordered for patient treatments. Because claimant was upset by and concerned about a discrepancy between the employer's product ordering policy and its actual practice, she was afraid that her testimony would be damaging to the employer, and that the employer would retaliate against her for her testimony. Claimant failed to demonstrate that she faced a grave situation. Her concern about possible disciplinary action if she testified truthfully appears to be unfounded; there is no evidence in the record that the employer's owner ever expressed any concern about claimant's possible testimony. In addition, claimant had reasonable alternatives to leaving work when she did. On the date she quit claimant, she did not know whether she would be required to testify at the arbitration hearing and did not know what she was expected to testify about. Consequently, she had no reason to conclude she would be forced to provide testimony harmful to the employer. Claimant could have inquired further about the upcoming hearing to find out if the attorney representing the employer intended to call her as a witness, and, if so, what questions she would be asked. Claimant could also have refused to testify at the hearing. When the ALJ asked claimant why she did not "simply refuse to testify and not quit," she could provide no clear reason why she did not. Transcript at 6. For these reasons, claimant failed to meet her burden to

demonstrate that she faced a situation so grave that a reasonable and prudent person would have no alternative but to quit her job when she did.

Claimant voluntarily left work without good cause and is disqualified from the receipt of benefits based on this work separation.

**DECISION:** Hearing Decision 15-UI-38491 is affirmed.

Susan Rossiter and D. P. Hettle, *pro tempore*;  
J. S. Cromwell, not participating.

**DATE of Service: July 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 Court of Appeals website at [courts.oregon.gov](http://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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